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SUPREME COURT, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

James A. TANFORD, and
Joseph Anthony Urbanski,
Petitioners,

v.

Myles BRAND, in his individual and official capacities as President of Indiana University; and Kenneth R.R. Gros Louis, in his individual and official capacities as Vice President and Chancellor of Indiana University at Bloomington,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

May 27, 1997

Richard A. Waples
WAPLES & HANGER
410 N. Audubon Road
Indianapolis, Indiana 46219
317/ 357-0903
317/ 353-9765 (fax)
Richwaples@aol.com

Counsel of Record

99pp

QUESTION PRESENTED

I. Whether the Establishment Clause is violated when state university officials select a cleric to give two prayers at graduation, provide him instructions on the content of those prayers, dress him in university regalia and include him on the dais with high ranking state university officials, and request the audience to stand and join the cleric in prayer?

II. Whether *Lemon v. Kurtzman* is still the controlling law in cases involving direct governmental sponsorship of religious activity?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997). It is reprinted in the Appendix at a-1. The opinion of the district court entering summary judgement is reported as *Tanford v. Brand*, 932 F. Supp. 1139 (S.D. Ind. 1996) and is reprinted at a-12. The opinion of the district court denying preliminary injunctive relief is reported as *Tanford v. Brand*, 883 F. Supp. 1231 (S.D. Ind. 1995) and is reprinted at a-30.

JURISDICTION

Plaintiffs-Petitioners James A. Tanford, and Joseph Urbanski sued the defendant state university official under 42 U.S.C. § 1983 for asserted violations of the Establishment Clause of the First Amendment to the U. S. Constitution. The district court had jurisdiction to hear the case pursuant to 28 U.S.C. §§ 1331 & 1343.

On May 4, 1995 the district court denied preliminary injunctive relief, and on July 15, 1996 entered summary judgment in favor of the defendants. Plaintiffs filed their Notice of Appeal on August 12, 1996. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

On January 16, 1997, the court of appeals affirmed and issued its judgment. On February 25, 1997, the court of appeals denied petitioners' petition for rehearing with suggestion for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1). May 25, 1997 was a Sunday and May 26, 1997 was a federal holiday.

CONSTITUTIONAL PROVISION INVOLVED

The following constitutional provision is relevant to the determination of this case: "Congress shall make no law . . . respecting an establishment of Religion[.]" U.S. Const. amend. I.

STATEMENT OF THE CASE

A. The Petitioners

Petitioners are a student and a professor at Indiana University. Petitioner James A. Tanford teaches in the School of Law. His attendance at graduation is not voluntary; he attends only when he is asked to attend by the Dean in order to represent the law school. He is a Roman Catholic and objects to nondenominational public prayer on religious grounds, believing them to trivialize and desanctify communication with his god.[1]

Petitioner Joseph A. Urbanski, who was valedictorian of his high school class, is an undergraduate at Indiana University who expects to graduate in May 1999. He was raised in a religious household, but after considerable study, personal experience, and contemplation, became an atheist. He objects to being prayed to by state officials, and

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[1]See Matthew 6:5-15 ("when thou prayest, thou shalt not be as the hypocrites are: for they love to pray [where] they may be seen of men.... When thou prayest, enter into thy closet [and] pray to thy father which is in secret"). See also Catechism of the Catholic Church 647 (1994) (the appropriate places for prayer are the home, shrines, monasteries, and the church, but not in public).

resents the support the state provides to theism by the practice of including prayers to a god at public ceremonies.

B. Prayer at Indiana University Graduation Ceremony

Indiana University is a state university funded by taxpayers and controlled by state law. It has eight campuses throughout the state. This lawsuit concerns state-sponsored prayers offered at graduation exercises on the Bloomington campus of Indiana University. Each campus has its own ceremony; not all have prayers. There are at least four other state-supported universities in Indiana: Purdue, Indiana State, Ball State, and Southern Indiana. Among them, only Purdue also has graduation prayers.

Each March an official of Indiana University selects a local religious leader to give an invocation and benediction at Commencement. No one from outside the Judeo-Christian tradition has ever been invited. Once the religious leader has accepted, a university official sends him or her a letter containing general instructions requesting that the prayer be nonsectarian and unifying. In 1995, that cleric was Rev. Robert Sims.

On a Saturday in early May, Indiana University holds its annual commencement exercises. In 1995, the year in which the injunction was first sought, the exercises were held in the football stadium. The ceremony was attended by members of the Board of Trustees, approximately 150 university administrative officials and faculty, approximately 5000 students, and 25,000-30,000 guests --

mostly the family and friends of the graduates. The guests sat in the stands. Members of the university community entered the stadium in an academic procession accompanied by ceremonial music. The Board of Trustees, senior university administrators, and a few specially invited guests including Rev. Sims marched at the head of the procession and took seats on a raised dais at one end of the stadium. They were followed by the faculty and students who sat on the stadium field facing the dias. The ceremony began with the national anthem. Next, the President of the University introduced Rev. Sims and asked everyone to stand and join him in an invocation. Rev. Sims, wearing the university's academic gown, stepped to the lectern and led the crowd in prayer.

Following the invocation was an address by the commencement speaker, the conferral of honorary degrees, the presentation of the graduating classes, student remarks, the charge to the graduating classes and the conferral of degrees. The awarding of doctorate degrees (including law) is accompanied by an ancient academic ritual called "hooding," in which the faculty present academic hoods to students by draping the hoods over the students' heads so they hang down the back of the academic gown. The hood is a symbol that the student has completed the requirements for the degree symbolized by the style of the hood. Degrees are awarded by the faculty, so this ceremony could not take place without the presence of faculty at graduation. In the School of Law in which Petitioner Tanford is a professor, there are not sufficient faculty volunteers to perform the hooding ritual, so the Dean requests all faculty

to participate in this ceremony on a rotating basis. Professor Tanford has never voluntarily, of his own initiative, attended graduation. Rather, he has attended only when asked to do so by the Dean, out of a sense of obligation to his fellow faculty members, one of whom would have to go in his place if he did not attend.

The ceremony concludes with the singing of the University *alma mater* and a second prayer called a benediction. The President of the University again asked the audience to stand for a prayer, and Rev. Sims again stepped to the lectern and led a prayer. The text of the benediction was:

> Let us pray. Gracious God we have gathered as dreamers. People who believe deep inside that things can be better. We have been called into being by you to make a difference. We like giving. Be with us as we endeavor to reach out to those who feel distance from the joy and the challenge of truth. We pray that we might touch with our learning those who feel that there is no hope, no reason to believe in life and love, and the possibility itself. Strengthen us for the journeys of mind, of heart, of spirit, of body, so that we might be right in truth for one another, and for our world. We ask this in the name of our common god. Amen.

The University defends its practice of sponsoring prayer at graduation on the ground that it is a 150-year-old tradition. However, there has been no single continuing

tradition with respect to prayer. Until a few years ago, the tradition was to invite only Protestant Christian ministers to lead the prayers. Only within the last ten years has the university expanded the pool to include Jewish and Catholic clergy, and requesting that the prayers be nonsectarian.

C. Proceedings Below

Professor Tanford and two other plaintiffs brought a federal civil rights action seeking preliminary and permenant injunctions against the university sponsoring prayer at Commencement. He had been asked by his Dean to attend the graduation ceremony that year. The other two plaintiffs were students who have since graduated. The District Court for the Southern District of Indiana denied the preliminary injunction. Petitioner Urbanski is an undergraduate student who expects to graduate in May 1999. He joined Professor Tanford as a plaintiff requesting a permanent injunction against graduation prayer. The district court denied the plaintiffs' motion for summary judgment, instead ruling that Indiana University's practice of state-sponsored prayer at graduation did not offend the Establishment Clause and entering summary judgment in favor of the defendants. 932 F. Supp. 1139, 1146 (S.D. Ind.1996).

The Court of Appeals affirmed on January 16, 1997. 104 F.3d 982. It failed to adhere to the prevailing three-part test for an Establishment Clause violation announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Instead, it inappropriately invoked *Marsh v. Chambers*, 463 U.S. 783 (1983), which created a narrow exception to the Establishment Clause for legislative prayer. The court of

appeals then bolstered its decision by announcing a series of Establishment Clause principles that run contrary to prevailing First Amendment doctrine:

1. Prayer may be used to solemnize a public ceremony

2. Nonsectarian prayer is permitted

3. There is no entanglement when state officials may select the cleric and instruct him concerning the content of his prayers

4. Brief prayers are a de minimis violation of the Establishment Clause and therefore are permissible

5. The Establishment Clause is violated only when the litigants are coerced to attend or participate in a religious activity

The court also made several clearly erroneous factual statements:

1. The court noted erroneously that "plaintiffs could simply attend the afternoon ceremonies, which do not contain an invocation or benediction." 104 F.3d at 986. This finding was clearly erroneous as to both petitioners.[2] Urbanski is an undergraduate, and the afternoon ceremony was for law students only. Prof. Tanford was not free to skip the morning ceremony because he had been asked by the Dean to represent the Law School at that ceremony.

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[2]It applied only to plaintiffs MacDonald and Suess, who are not parties to this Petition.

2. The court stated that "there was no coercion--real or otherwise--to participate." 104 F.3d 985. The undisputed fact is that Prof. Tanford's attendance was not voluntary, but was "part of [his] duties at the law school." 883 F. Supp. 1231, 1235. Also, participation in college graduation is as consequential and important to those students who have continued their education as is participation in high school graduation for those students who have achieved that level of education.

3. The court asserted that the practice of graduation prayer at state university graduations is "widespread throughout the nation." 104 F.3d at 985. No evidence to this effect was presented, nor did the District Court make any such finding. See 932 F. Supp. at 1145 (discussion of university tradition makes no mention of national tradition).

Rehearing was denied on February 25, 1997.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT IGNORED CONTROLLING SUPREME COURT PRECEDENT WHEN IT DID NOT APPLY THE *LEMON* TEST TO STATE SPONSORED RELIGIOUS ACTIVITY.

The Seventh Circuit did not analyze the constitutionality of state-sponsored graduation prayer by using the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971),[3] implying that *Lemon's* application is limited to cases involving financial aid to religion. 104 F.3d at 986 ("Lemon [involved] financial aid to church-related educational institutions, a far cry from the non-denominational invocation and benediction at the Bloomington commencement."). The opinion only briefly alluded to a requirement that the university have a "legitimate" secular purpose that did not have a primary effect of "endorsing" religion.[4] 104 F.3d at 985. This

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[3]The Lemon test is: "to satisfy the Establishment Clause a governmental practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." *Lee v. Weisman*, 505 U.S. 577, 584-85 (1992).

[4]This "legitimate" secular purpose standard is not as rigorous as the state interest standard expressed in Lemon, which asks whether the practice reflects a "clearly" secular purpose. The Seventh Circuit also made no mention of *Lemon's* prohibition against a state policy that "advances" religion. See *Lee v. Weisman*, 505 U.S. 577, 584-85 (1992).

failure to apply *Lemon* has been commented on in the legal literature. ABA Journal, April 1997 at 37.

Th appeals court's refusal to apply *Lemon* obviously conflicts with the Supreme Court's reliance on *Lemon* in cases involving state sponsorship of religious activities. *E.g., County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) (applying *Lemon* test to private groups seeking to erect a creche and menorah on public property); *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (using *Lemon* test to analyze Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act"); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-26 (1982) (using *Lemon* to review a statute delegating to churches the power to prevent the issuance of liquor licenses within a 500-foot radius). See also *Lee v. Weisman*, 505 U.S. 577, 586 (1992) ("we do not accept the invitation ... to reconsider our decision in *Lemon v. Kurtzman*;" holding high school graduation prayer unconstitutional).

Until recently, the *Lemon* test was used in *every* Supreme Court Establishment Clause case. See *Lee v. Weisman*, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring) (Court has relied on *Lemon* in all 31 Establishment Clause cases since 1971 except *Marsh v. Chambers*); *County of Allegheny v. A.C.L.U. Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) (*Lemon* "applied regularly in the Court's later Establishment Clause cases"); *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) ("the Lemon test has been applied in all cases since its

adoption in 1971, except in *Marsh v. Chambers*"). Within the last few years, however, there has emerged some disagreement on the Supreme Court as to whether *Lemon* should be applied in equal access cases. *See Rosenberger v. Univ. of Virginia*, 115 S.Ct. 2510 (1995) (student religious group's equal access to student activity funds); *Capitol Sq. Rev. and Adv, Bd. v. Pinette*, 115 S.Ct. 2440 (1995) (private group's equal access to public forum to erect a cross). However, no majority has explicitly renounced *Lemon* even in this context, so it remains the law of the land. *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 710 (1994) (Blackmun, J., concurring) (*Lemon* remains good law).

The Seventh Circuit appears to be anticipating that the full Court will soon adopt Justice Scalia's call for the abandonment of *Lemon*. *E.g., Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 750-51 (1994) (Scalia, J. dissenting); *Lee v. Weisman*, 505 U.S. 577, 586 (1992) (Scalia, J., dissenting). To the contrary, the majority of this Court continues to reiterate that *Lemon* remains good law. *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 395 n.4 (1993) (equal access to school facilities; majority of Court noted specifically that *Lemon* has not been overruled and remains the law); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("we do not accept the invitation of petitioners ... to reconsider our decision in *Lemon v. Kurtzman*").

On prior occasions when a circuit court has declined to follow applicable Supreme Court decisions in the belief that

those decisions were outdated or would soon be overruled, this Court has granted certiorari and criticized the usurpation of Supreme Court prerogative. *E.g., Rodriguez De Quijas v. Shearson/American Express*, 490 U.S. 477 (1989) ("if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"); *Thurston Motor Lines Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("only [the Supreme] Court may overrule one of its precedents;" until that occurs, the precedent "is the law.").

II. THE SEVENTH CIRCUIT'S FAILURE TO APPLY THE *LEMON* TEST CONFLICTS WITH DECISIONS REACHED IN OTHER CIRCUITS AND ILLUSTRATES THE CONFUSION REIGNING IN THE LOWER COURTS ABOUT THE STATUS OF *LEMON*

There is a split among recent circuit court decisions on the current status of the *Lemon* test. The Seventh Circuit declined to apply *Lemon* in this case. The Third Circuit has stated the opposite view -- that the *Lemon* test "remains the law of the land, and we are obligated to consider it until instructed otherwise by a majority of the Supreme Court." *A.C.L.U. of N.J. v. Black Horse Pike Regional Bd. of Ed.*, 84 F.3d 1471, 1484 (3d Cir. 1996) (en banc) (high school graduation prayer). The Eleventh Circuit similarly held that "this Court must apply [the]

three-pronged analysis [of] *Lemon v. Kurtzman.*" *Jager v. Douglas Co. School Dist.*, 862 F.2d 824, 828 (11th Cir. 1989) (invocations at high school football games). The Fifth Circuit cannot decide what to do, first holding that Establishment Clause "claims are guided by the three-part test enunciated in *Lemon v. Kurtzman*," *Doe v. Duncanville Indep. School Dist.*, 994 F.2d 160, 163 (5th Cir. 1993) (prayers at basketball games), then "eschew[ing] the tripartite Lemon analysis." *Id.* at 166 n.7, and finally holding that there are "three tests" to analyze Establishment Clause issues -- the *Lemon* test, a "coercion" test, and an "endorsement" test. *Ingebretsen v. Jackson Pub. School Dist.*, 88 F.3d 274, 278-79 (5th Cir. 1996).

III. THE SEVENTH CIRCUIT APPLIED THE "TRADITION" EXCEPTION OF *MARSH V. CHAMBERS* TO GRADUATION PRAYER, WHICH CONTRAVENES SUPREME COURT PRECEDENT AND CONFLICTS WITH OTHER CIRCUITS.

The Seventh Circuit held that public university graduation prayers were constitutional by applying the "tradition" exception of *Marsh v. Chambers*, 463 U.S. 783 (1983) (legislative prayer constitutional because of its unique history). It held that "the University's practice of having an invocation and benediction at its commencements has prevailed for 155 years," serves to continue this tradition, and therefore "is 'simply a tolerable acknowledgment of beliefs widely held among the people of this country.'" 104 F.3d at 986 (citing *Marsh*).

The court of appeals' position contravenes the Supreme Court's prior decisions that *Marsh* is not to be extended beyond the legislative setting nor to institutions that did not exist at the time of the framing of the Constitution. Indeed, *Marsh* itself holds that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." 463 U.S. at 790. Only the unique history of legislative prayer justifies an exception to the usual Establishment Clause prohibition against state-sponsored religious activity. Id.

Since *Marsh*, no Supreme Court majority has found another institutional setting in which the "tradition" exception can be invoked. See *Lee v. Weisman*, 505 U.S. 577, 596-97 (1992) (inherent differences between graduation and a session of a state legislature "distinguish this case from *Marsh v. Chambers* . . . . The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the ... force of a formal exercise in a school graduation "); *County of Allegheny v. A.C.L.U. Greater Pittsburgh Chapter*, 492 U.S. 573, 602 (1989) (not appropriate to apply the *Marsh* "tradition" analysis to display of creche on public property); *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (The historical approach used in *March* "is not useful in determining the proper roles of church and state in public schools").

The Supreme Court has explained that *Marsh* was a limited, unique exception that depended on a key fact: the Constitutional Convention and the First Congress, which

predated the Bill of Rights, were opened with prayers. Thus, a special case is made for religious traditions that pre-dated the Bill of Rights. However, "since free public education was virtually nonexistent at the time the Constitution was adopted," it would be inappropriate to apply *Marsh* to school prayer. *Edwards v. Aguillard*, 482 U.S. 578, 583, 583 n.4 (1987). State universities also did not exist at the time the Constitution was adopted. The first was the University of North Carolina, which did not open its doors until 1795. Columbia Encyclopedia 1067 (5th ed. 1993).

The Seventh Circuit's decision to apply the "tradition" rationale of *Marsh v. Chambers* outside the context of legislative prayer conflicts with decisions from five other circuits, which have rejected the notion that historical tradition justifies state-sponsored religious activity. *See Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995) (city seal containing a Latin cross violated Establishment Clause despite its tradition; *Marsh* not applicable); *A.C.L.U. of N.J. v. Black Horse Pike Regional Bd. of Ed.*, 84 F.3d 1471, 1474 (3d Cir. 1996) (en banc) (graduation prayer declared unconstitutional despite "longstanding tradition;" *Marsh* not applicable); *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1149-50 (4th Cir. 1991) (judge opening court with prayer was unconstitutional; *Marsh* not applicable in the absence of proof that an official religious event was a widespread practice in 1789); *Jager v. Douglas Co. School Dist.*, 862 F.2d 824, 828-29 (11th Cir. 1989) (invocations at high school football games unconstitutional

despite being traditional "because invocations at school-sponsored football games were nonexistent when the Constitution was adopted"). Even *Jones v. Clear Creek Indep. School Dist*, 977 F.2d 963, 966 (5th Cir 1992), the controversial case that approved student-initiated graduation prayers, "applied *Lemon's* tripartite test rather than the historical approach [of] *Marsh v. Chambers*."

IV. THE SEVENTH CIRCUIT CONTRAVENED SUPREME COURT PRECEDENT AND THE DECISIONS OF OTHER CIRCUITS WHEN IT RULED THAT PRAYER IS ACCEPTABLE IF "NONSECTARIAN"

The Seventh Circuit held that "the University's inclusion of a brief *non-sectarian* invocation and benediction [did] not have a primary effect of endorsing ... religion." 104 F.3d at 986 (emphasis added). It appears to have been significant to the court of appeals that the prayers did not "endorse any *particular* religion." Id. at 985 (emphasis added). The appeals court bolstered this view by citing Supreme Court dictum that "University students... should be able to appreciate that the University's policy is one of neutrality of religion." *Widmar v. Vincent*, 454 U.S, 263, 274 n. 14 (1981).

The Supreme Court has consistently held to the contrary, that the nonsectarian nature of prayer is constitutionally irrelevant. The state cannot advance religion generally any more than it could advance a particular sect. Indeed, the graduation prayer declared

unconstitutional in *Lee v. Weisman*, 505 U.S. 577, 581-82, 89 (1992) was nonsectarian.

The classic statement of this principle comes from *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968):

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The Fisrt Amendment mandates governmental neutrality between religion and religion, *and between religion and nonreligion."* (emphasis added)

The Court has adhered to and reaffirmed this view in all of its recent Establishment Clause cases. *See Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 696 (1994) (proper respect for ... the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents); *County of Allegheny v. A.C.L.U. Greater Pittsburgh Chapter*, 492 U.S. 573, 605 (1989) ("we have held [the Establishment Clause] to mean no official preference even for religion over nonreligion"); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (Establishment Clause is violated when the State promotes "religion in general" as opposed to nonreligion); *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373,

382 (1985) (even a "praiseworthy secular purpose" cannot validate government policies that have "the effect of promoting ... religion generally; Establishment Clause requires the state to maintain neutrality between religion and nonreligion); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (striking down a nonsectarian moment of silence).

The Seventh Circuit's view that nonsectarianism matters conflicts with decisions from two other circuits. The Third and Fifth Circuits have followed the Supreme Court's rule that the nonsectarian nature of a state-sponsored prayer is constitutionally irrelevant. See *A.C.L.U. of N.J. v. Black Horse Pike Regional Bd. of Ed.*, 84 F.3d 1471, 1487 (3d Cir. 1996) (en banc) (nonsectarian graduation prayer unconstitutional; impermissibly favors religions collectively over nonreligion); *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274, 279 (5th Cir. 1996) (nonsectarian prayer at school events and ceremonies violates Establishment clause because it advances religion over irreligion); *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) (the fact that school prayers "do not promote some sectarian religious practice is without constitutional significance" because the First Amendment demands "absolute governmental neutrality with respect to religion... neither encouraging nor discouraging religious belief or unbelief.").

V. THE SEVENTH CIRCUIT CONTRAVENED *LEE V. WEISMAN* BY HOLDING HELD THAT THERE IS NO "ENTANGLEMENT" WHEN STATE OFFICIALS SELECT A CLERIC AND INSTRUCT HIM CONCERNING THE CONTENT OF THE PRAYER

Prior to Indiana University's 1995 commencement, university officials selected a Catholic priest to give the invocation and benediction, and instructed him in writing to avoid sectarianism. The Seventh Circuit held that "[t]he instruction given to the cleric at the ceremony was merely to 'include an uplifting, general message' and involved only a minor contact between the university and local clergy,"104 F.3d at 985; so "there is no excessive entanglement of church and state" because of either the "selection of a cleric or its instruction" to him." Id. at 986.

The issue of whether state officials may constitutionally select a cleric and instruct him to keep the prayers nonsectarian was decided contrary to the Seventh Circuit position in *Lee v. Weisman*, 505 U.S. 577, 588-89 (1992). In that case, school officials similarly selected the cleric and "advised [the cleric] that his prayers should be nonsectarian." The Court held that by this action, state officials "directed and controlled the content of the prayers." Even though this was a "good-faith attempt by the school to [remove] sectarianism ... from the graduation ceremony," it nevertheless entangled the school in a religious enterprise, and violated the Establishment Clause.

The Seventh Circuit's view that selection and instruction is not "excessive entanglement" also conflicts

with a Fifth Circuit case, *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274, 279 (5th Cir. 1996). In that case, the court struck down a state law authorizing nonsectarian prayer at school events and ceremonies because public officials "determining who gets to say the prayer" was excessive entanglement.

VI. THE SEVENTH CIRCUIT'S DECISION THAT PRAYER MAY BE USED TO SOLEMNIZE A PUBLIC CEREMONY IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND CONFLICTS WITH OTHER CIRCUITS

The Seventh Circuit held that prayer may legitimately be used at a state university ceremony to solemnize the occasion. It held that the "invocation and benediction serve legitimate secular purposes of solemnizing public occasions," and that the First Amendment was not intended to prohibit states [here a university] from sanctioning ceremonial invocations of God." 104 F.3d at 986

The Supreme Court has previously rejected the argument that public prayers at events such as graduation are merely ceremonial or part of a constitutional "civic" religion that may be used to solemnize a public event. In *Lee v. Weisman*, the closest analogous case, the Court held that high school graduation prayers could not be justified on ceremonial grounds. It held that prayers are a "state-sponsored and state-directed religious exercise," and criticized the "suggestion that government may establish an official or civic religion as a means of avoiding the

establishment of a religion with more specific creeds ... as a contradiction that cannot be accepted." 505 U.S. 577, 586 (1992). See also *Engle v. Vitale*, 370 U.S. 421, 424-25 (1962) (nonsectarian daily classroom prayer struck down; the "invocation of God's blessings as prescribed in the Regents' prayer is a ... solemn avowal of divine faith and supplication for the blessings of the Almighty[; t]he nature of such a prayer has always been religious").

At least four other circuits have held that prayer is inherently a religious activity and may not be used to solemnize a public event. The Third Circuit rejected the "solemnization" argument, stating "we are unable to understand why graduation would be any less solemn" without the prayer. *A.C.L.U. of N.J. v. Black Horse Pike Regional Bd. of Ed.*, 84 F.3d 1471, 1484-85 (3d Cir. 1996) (en banc) (graduation prayer). The Eleventh Circuit similarly held that since this solemnizing purpose could be served by requiring wholly secular inspirational speeches, "the state cannot employ a religious means to serve otherwise legitimate secular interests." *Jager v. Douglas Co. School Dist.*, 862 F.2d 824, 829-30 (11th Cir. 1989). *See also A.C.L.U. of Georgia v. Rabun Co. Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) (Latin cross alleged to serve secular purpose of "tourism;" state may not employ religious means to reach a secular goal unless secular means are wholly unavailing); *Harris v. Joint School Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated* 115 S.Ct. 2604 (1995); *dismissed as moot on remand* 62 F.3d 1233 (9th Cir. 1995) (use of prayer to solemnize

public high school graduation ceremony was not valid secular purpose and violated Establishment Clause).

The Fifth Circuit has most emphatically rejected the notion that prayer can legitimately serve a secular ceremonial purpose:

> Prayer is perhaps the quintessential religious practice for many of the world's faiths.... Even if the avowed objective ... is not itself strictly religious, [the] unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests... That [prayer] may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise.

Karen B. v. Treen, 653 F.2d 897, 901 (5th Cir. 1981).

VII. THE SEVENTH CIRCUIT'S "DE MINIMIS" EXCEPTION FOR BRIEF PRAYERS CONTRAVENES SUPREME COURT PRECEDENT AND THE DECISIONS OF OTHER CIRCUITS.

The Seventh Circuit invoked a "*de minimis*" exception, holding that because the graduation prayers were brief and did not "dominate" the ceremony, they were constitutionally permissible even if they advanced religion. The court stated: "Insofar as there is any advancement of religion or governmental entanglement, it is de minimis at best." 104 F.3d at 986. The appeals court approved the district court's statement that "the challenged invocation

and benediction passed constitutional muster ... because they ... did not dominate the baccalaureate ceremony." Id. at 985.

The Seventh Circuit decision contravenes Supreme Court precedents which have rejected the creation of a *de minimis* exception in cases of state-sponsored religion.[5] In *Lee v. Weisman*, 505 U.S. 577, 594 (1992), the Court rejected the argument that high school graduation prayers should be permitted because they were brief:

> It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers ... are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority.

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There is a *de minimis* exception when the only alleged Establish-ment Cluse violation is the expenditure of public money that benefits religion, but that exception should have no bearing in a case involving state sponsored prayer. E.g., Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 395 (1993) (providing equal access to school facilities involved only de minimis expenses connected to providing heat, electricity etc.).

> And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these.

See also *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (striking down moments of silence because "[t]he importrance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech").

Three other circuits have taken a position contrary to the one articulated by the Seventh Circuit. The Fifth Circuit ruled that brief nonsectarian prayers at school events and ceremonies would violate the Establishment Clause despite their brevity, holding that the "[l]oss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). Similarly, the Eleventh Circuit rejected a de minimis argument concerning invocations at high school football games, holding that "[t]he Establishment Clause does not focus on the amount of time an activity takes, but rather examines the religious charaacter of the activity." *Jager v. Douglas Co. School Dist.*, 862 F.2d 824, 832 (11th Cir. 1989). The District of Columbia Circuit rejected a *de minimis* argument used to defend the closing of a public library on Easter. *Bonham v. District of Col. Library Admin.*, 989 F.2d 1242 (D.C. Cir. 1993).

VIII. THE SEVENTH CIRCUIT CONTRAVENED DECISIONS OF THE SUPREME COURT AND OTHER CIRCUITS BY HOLDING THAT GRADUATION PRAYER IS EXEMPT FROM THE ESTABLISHMENT CLAUSE BECAUSE IT IS VOLUNTARY

The Seventh Circuit ruled that Indiana University graduation prayers were constitutional because graduation was "voluntary," many students in fact chose not to attend, and "the mature stadium attendees were ... free to ignore the cleric's remarks" 104 F.3d at 985-96.

This holding is not consistent with the "coercion" analysis used in *Lee v. Weisman*, 505 U.S. 577, 594-95 (1992). In that case, the Court found a violation of the Establishment Clause because students were coerced by officials, family and peers to attend graduation at which prayers were given. Nowhere did the Court indicate that the *absence* of coercion meant there was no violation; only that the absence of coercion would mean that the case was to be analyzed according to the more usual *Lemon* test. See also *Engle v. Vitale*, 370 U.S. 421, 430 (1962) (voluntary classroom prayer unconstitutional; Establishment Clause "does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official [nonsectarian] religion whether those laws operate directly to coerce non-observing individuals or not").

The voluntariness exception suggested by the Seventh Circuit would be directly at odds with a line of cases finding that religious displays violate the Establishment

Clause although no one is coerced to view them. *E.g.*, *County of Allegheny v. A.C.L.U. Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) (creche and menorah on public property unconstitutional because they had the "effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence"); *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995) (city seal containing Latin cross violated Establishment Clause, notwithstanding contention that seal merely symbolized city's unique history and heritage; clearly no "coercion" issue); *Washegesic v. Bloomingdale Pub. Schools*, 33 F.3d 679 (6th Cir. 1994) (portrait of Jesus in school hallways visible to visitors to the school was unconstitutional); *A.C.L.U. of Georgia v. Rabun Co. Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) (lighted cross in state park); *American Jewish Congress v. Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (menorah in city park); *ACLU v. Schundler*, 104 F3d 1435 (3rd Cir. 1997) (creche at city hall).

Two circuits have had the opportunity to rule directly on the voluntariness argument and rejected it; both found that voluntariness does not save an otherwise unconstitutional state sponsored religious activity. In *Jager v. Douglas Co. School Dist.*, 862 F.2d 824, 831-32 (11th Cir. 1989), the court struck down invocations at high school football games, rejecting arguments that attendance was voluntary, many students elected not to attend, and the audience was more mature than at other school functions. It held that "When a religious invocation is given via a sound system controlled by school principals and the

religious invocation occurs at a school-sponsored event at a school-owned facility, the conclusion is inescapable that the school endorses the religious invocation." The "Establishment Clause focuses on the constitutionality of the state action, not on the choices made by the complaining individual." In *Doe v. Duncanville Indep. School Dist.*, 994 F.2d 160, 163 (5th Cir. 1993), the court similarly held that prayers at voluntary basketball games were unconstitutional.

Perhaps the most fundamental flaw of the court of appeals' decision is its requirement of subjective coercion for an Establishment Clause violation. The decision creates a dangerous precedent by essentially holding that a governmental entity can solicit, sponsor, and endorse a religious prayer to a captive audience it has assembled for an important public event, so long as the particular litigants challenging the prayers are not likely to be subjectively converted by the prayers to a particular religious point of view. This holding diminishes the substantial support such officially-endorsed religious services provides to religion, offends the important principle that government should remain neutral not only towards particular religions, but to religion in general, and incorrectly focuses the Establishment Clause inquiry on the variable sensibilities of plaintiffs rather than on the extent and nature of the religious practices engaged in by governmental defendants.

CONCLUSION

Although no federal case has directly decided whether a state university may include a prayer in its graduation exercises, the law and doctrines to be applied in such a case have been clearly set down in Supreme Court Establishment Clause decisions. The weight of that authority suggests that such state-university sponsorship of religion should be found unconstitutional. Under the Court's *Lemon* test, prayer has rarely been found to have a secular purpose because it is so quintessentially a religious activity; state-sponsored prayer at a public event advances religion generally as opposed to non-religion; and the state's selection of a cleric and instructions to him on the content of his prayer entangle the state in religion. Such prayers should not be justified on the ground that they are voluntary, nonsectarian, traditional, or merely used to solemnize a secular occasion.

The Seventh Circuit's decision allowing state-sponsored prayer at graduation deviated from well established doctrines, and created an anomalous decision at odds with the other circuit courts. For these reasons, the petition for a writ of certiorari should be granted, and the decision of the Seventh Circuit reversed.

Respectfully submitted,

May 27, 1997

Richard A. Waples
WAPLES & HANGER
410 N. Audubon Road
Indianapolis, Indiana 46219
TEL: (317) 357-0903
FAX: (317) 353-9765
EMAIL: Richwaples@aol.com

Counsel of Record

APPENDIX

The Seventh Circuit's Opinion in
Tanford v. Brand,
104 F.3d 982 (7th Cir. 1997) a-1

The Seventh Circuit's Order
of Feb. 25, 1997 (denying rehearing) a-11

The District Court's Entry in
Tanford v. Brand,
932 F. Supp. 1139 (S. D. Ind. 1996)
Granting Summary Judgment a-12

The District Court's Entry in
Tanford v. Brand,
883 F. Supp. 1231 (S.D. Ind. 1995)
Denying Preliminary Injunctive Relief a-30

James A. TANFORD, Kimberly J. MacDonald, David Suess and Joseph Anthony Urbanski, Plaintiffs-Appellants,

v.

Myles BRAND, Doctor, in his individual and official capacities as President of Indiana University; and Kenneth R.R. Gros Louis, Doctor, in his individual and official capacities as Vice President and Chancellor of Indiana University at Bloomington, Defendants-Appellees.

No. 96-3053.

United States Court of Appeals, Seventh Circuit.

Argued Dec. 10, 1996.

Decided Jan. 16, 1997.

Rehearing and Suggestion for Rehearing En Banc Denied Feb. 25, 1997.

CUMMINGS, Circuit Judge.

Three individuals brought this suit to enjoin the giving of an invocation and benediction during the May 19, 1995 Commencement Ceremony on the Bloomington campus of Indiana University. Plaintiff Tanford is an Indiana Law School professor at Bloomington and plaintiffs MacDonald and Suess were law students there. After their motion for preliminary injunction concerning the May 6, 1995 Commencement Ceremony was denied, the complaint was amended to add Joseph Anthony Urbanski as a plaintiff. He was an undergraduate student majoring in computer science on the Bloomington campus. The district court denied summary judgment to plaintiffs and entered judgment in favor of the defendants. 932 F.Supp. 1139, 1146 (S.D.Ind.1996).

On May 5, 1995, the Bloomington commencement activities began at the University President's home. The

following day a university-wide Commencement Ceremony took place in the University's football stadium at 10:00 a.m. Special events followed for graduates of the various schools and their families. A committee consisting of faculty, staff and students was responsible for planning the commencement activities.

Thirty thousand to 35,000 people attended the Saturday morning stadium Commencement Ceremony. All graduating students were invited to attend, but attendance is voluntary and no penalty is imposed for non-attendance. Of the 7,400 graduating students in the undergraduate and graduate schools, approximately 5,000 attended.

Five thousand students and 150 University officials and faculty members formed the academic procession to the Commencement Ceremony. These persons proceeded to chairs placed in the football field whereas the 25,000 to 30,000 visitors and guests were seated in the stadium's permanent seats. The ceremony consisted of the national anthem, a nonsectarian invocation, an address by the commencement speaker, the conferral of honorary degrees, the presentation of the graduating classes, student remarks, the charge to the graduating classes, the conferral of degrees, the induction ceremony, the singing of the University's song, and a nonsectarian benediction. Fifteen to fifty-five percent of the students graduating from the law school attend the university- wide Commencement Ceremony (Defendants' Br. 3).

In 1840, the University commenced having a nonsectarian invocation and benediction to open and close the morning Commencement Ceremony. A religious leader from the Bloomington area is invited to give the invocation and benediction. The prayers usually refer to a

deity.[1] A different person is chosen each year and in addition to the invocation that person is invited to give an uplifting and unifying benediction. In 1995, Father Ralph W. Sims of the St. Paul Catholic Center delivered the invocation and benediction. His parish serves the University's Catholic students. In the previous year, the invocation and benediction were given by Reverend Barbara Carlson of the Unitarian Universalist Church. Over the previous five years the invocation and benediction were delivered by clergymen from the First Presbyterian Church, the First United Methodist Church, and the B'Nai B'Rith Hillel Foundation. Most of those seated in the stadium do not stand for the invocation and benediction.

University President Brand has explained that this ceremony is not to sponsor any particular religious faith or even to endorse religion but is meant to serve secular objectives by emphasizing the solemnity and dignity of the ceremony.

The four plaintiffs may be described as follows:

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[1]The May 1995 benediction read as follows Let us pray. Gracious God we have gathered as dreamers. People who believe deep inside that things can be better. We have been called into being by you to make a difference. We like giving. Be with us as we endeavor to reach out to those who feel distance from the joy and the challenge of truth. We pray that we might touch with our learning those who feel that there is no hope, no reason to believe in life and love, and the possibility itself. Strengthen us for the journeys of mind, of heart, of spirit, of body, so that we might be right in truth for one another, and for our world. We ask this in the name of our common God. Amen.

1. Professor Tanford is 45 years old and has tenure at the University. His undergraduate degree was obtained from Princeton University and he received his J.D. and L.L.M. degrees from Duke University. He has taught at the law school since 1979. He attended only one Commencement Ceremony since 1979 when he commenced teaching law. He attended the 1987 Commencement Ceremony because he was asked to "hood" students there. However, he absented himself when the invocation began, returned for the hooding and left before the benediction. He said that he did not think all 7,000 people who stood during the invocation and benediction believed in the religious message conveyed and that the Commencement Ceremony would not affect the religious beliefs of those in attendance. In 1988 or 1989, he wrote the student newspaper urging the faculty and University community generally to boycott graduations because of the "inappropriateness of having prayer."

2. Third-year law student MacDonald was expected to graduate in May 1995. She had received her Bachelor of Arts degree from Indiana University in May 1992. She stated that she attended the May 1992 Commencement Ceremony when she received her undergraduate degree although she was uncomfortable in participating in a service led by someone of a different faith. She stated that her conscience would be offended if there were an invocation and benediction in 1995. She also attended the Commencement Ceremony in May 1994, being curious about the invocation and benediction. She planned to attend the 1995 Saturday afternoon law school Recognition Ceremony, knowing it would not have an invocation or benediction. She knew that she was not required to attend the stadium Commencement Ceremony and was uncertain

whether she would attend if there were an invocation and benediction, even though her parents, family and friends were interested in attending. She stated that she would be bothered if her daughter saw a religious figure on the stage with the University president or giving a prayer. She did not disclose whether she attended the 1995 Commencement Ceremony after the preliminary injunction was denied.

3. Plaintiff Suess was a first-year law student, expected to graduate from the law school in May 1997. He is of the Jewish faith and stated that he was offended by the giving of a nonsectarian invocation and benediction because it is a form of proselytizing although he said it would not have any effect on his personal religious beliefs. He had attended an invocation and benediction at his undergraduate commencement ceremony at the University of Chicago, although he did not participate in it. Suess said he had been advised of the 1995 law school activities by law school friends and quite possibly would attend the morning Commencement Ceremony at the stadium. He did not say whether he attended the ceremony after the preliminary injunction was denied. He was planning to attend the 1995 graduating Recognition Ceremony at the law school although he did not know whether there would be an invocation or benediction. As customary there was none.

4. Urbanski was an undergraduate plaintiff and was added after the preliminary injunction was denied. He opposes graduation prayer because he believes there should be a separation between church and state in a public institution. Prayer makes him uncomfortable. However, he agreed with his public high school policy which permitted students to have a moment of silence or a

short prayer during commencement speeches. He expected to attend the 1999 Commencement Ceremony and would stay during the invocation and benediction because it is inconvenient to leave during parts of the ceremony. He would sit quietly until the prayer was over but would not participate in it. His beliefs would not be impacted by the ceremony.

Thomas Bolyard, Director of University Field Services, said one of his responsibilities is to accommodate persons who have special problems or requests related to the Commencement Ceremony. He said it would be an easy matter to accommodate plaintiff Tanford and others who wished to be seated where they could enter or exit the Ceremony at will. He said that it was common for seated students or faculty members to get up and move around during the ceremony. He stated that some students and faculty members arrive late and leave early and often leave their seats to get a drink or use the restrooms.

In May 1995 the district court denied a preliminary injunction. After filing an amended complaint and answer, plaintiffs filed a motion for summary judgment which was denied in a July 1996 twenty-page entry reported at 932 F.Supp. 1139. We affirm.

In the opinion below, Chief Judge Barker pointed out that under Lee v. Weisman, 505 U.S. 577, 586, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (involving a prayer delivered by a clergyman at a middle school graduation), the Constitution guarantees that government "may not coerce anyone to support or participate in religion or its exercise" and under Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111-12, 29 L.Ed.2d 745 (1971), the Constitution requires that state actions "have a secular

purpose, that they neither advance nor inhibit religion and * * * that they do not produce excessive government entanglement with religion." 932 F.Supp. at 1142. The district court concluded that plaintiffs were not entitled to relief under either standard.

The district court found Lee to be inapplicable because these plaintiffs are adults rather than younger students requiring special solicitude. In this regard, the district court observed that peer pressure is unlikely to dissuade college graduates from protesting, and the opinion below noted that thousands of graduates chose not to attend the stadium morning ceremony and that non- adherents could dissent without being noticed. The opinion also noted that plaintiffs could simply attend the afternoon ceremonies, which do not contain an invocation or benediction, and that in any event the stadium ceremony presented no threat of establishing religion. 939 F.Supp. at 1143-1145, 1147.

The district court also found that the challenged invocation and benediction passed constitutional muster under the Lemon test because they served only to solemnize a public ceremony and continue a 155-year-old University tradition and did not dominate the baccalaureate ceremony, nor did they endorse any particular religion or influence religious beliefs. The instruction given to the cleric at the ceremony was merely to "include an uplifting, general message" and involved only a minor contact between the university and local clergy. Id. at 1145-1146.

Discussion

All parties discuss Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649. There Providence, Rhode Island, officials permitted middle and high public school principals to invite members of the clergy to give invocations and benedictions at graduation ceremonies.

The middle school principal in question invited a rabbi to deliver prayers at the graduation exercises of Deborah Weisman, daughter of plaintiff. Rabbi Gutterman's invocation thanked God for protecting the rights of minorities, liberty, political process, court system and destiny. His benediction was couched in a similar, nonsectarian vein. Student attendance and participation in this "state-sponsored religious activity" were "in a fair and real sense obligatory" (505 U.S. at 586, 112 S.Ct. at 2655). The Court added: "The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state- directed religious exercise in a public school" (505 U.S. at 587, 112 S.Ct. at 2655).

Justice Kennedy's majority opinion in Lee explained: "There are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools" (505 U.S. at 592, 112 S.Ct. at 2658). Finally, in closing the Court stressed that the objecting student was in effect compelled to attend and participate in an explicit religious exercise she had no real alternative to avoid (505 U.S. at 598, 112 S.Ct. at 2661).

Unlike Lee, here there was no coercion--real or otherwise--to participate. Many students chose not to attend the stadium exercises. Others left during the invocation, then returned and exited before the benediction. Still others sat during both events, as did most stadium attendees. At the afternoon ceremonies, no prayer was involved. Finally, the mature stadium attendees were voluntarily present and free to ignore the cleric's remarks. Most remained seated. Under these facts, in which the special concerns underlying the Supreme Court's decision in Lee are absent, the district

court correctly determined that Lee does not require the challenged practices to be struck down. Cf. Widmar v. Vincent, 454 U.S. 263, 274 n. 14, 102 S.Ct. 269, 276 n. 14, 70 L.Ed.2d 440 (1981) ("University students * * * are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality of religion.").

Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, is plaintiffs' other principal reliance. There Pennsylvania and Rhode Island each gave financial aid to church-related educational institutions, a far cry from the non-denominational invocation and benediction at the Bloomington commencement.

Here the University's practice of having an invocation and benediction at its commencements has prevailed for 155 years and is widespread throughout the nation. Rather than being a violation of the Establishment Clause, it is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." Marsh v. Chambers, 463 U.S. 783, 792, 103 S.Ct. 3330, 3336, 77 L.Ed.2d 1019 (1983). As we held in Sherman v. Community Consolidated School District 21, 980 F.2d 437 (7th Cir.1992), Illinois public schools may lead the Pledge of Allegiance, including its reference to God, without violating the Establishment Clause of the First Amendment. Similarly here, the invocation and benediction serve legitimate secular purposes of solemnizing public occasions rather than approving particular religious beliefs. Lynch v. Donnelly, 465 U.S. 668, 693, 104 S.Ct. 1355, 1369-70, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring). As the concurring opinion in Sherman summarized, "the First Amendment was not intended to prohibit states [here a university] from

21sanctioning ceremonial invocations of God. Such * * * action simply does not amount to an establishment of religion" (980 F.2d at 448). Finally, as the district court correctly determined, the University's inclusion of a brief non-sectarian invocation and benediction does not have a primary effect of endorsing or disapproving religion, and there is no excessive entanglement of church and state by virtue of the University's selection of a cleric or its instruction to the cleric that his or her remarks should be unifying and uplifting. Insofar as there is any advancement of religion or governmental entanglement, it is de minimis at best. See Metzl v. Leininger, 57 F.3d 618, 620 (7th Cir.1995) (observing that "a law that promotes religion may nevertheless be upheld * * * because the effect in promoting religion is too attenuated to worry about").

Judgment affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 25, 1997

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

JAMES A. TANFORD, et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Southern District of Indiana,
No. 96-3053 vs.	)	Indianapolis Division.
MYLES BRAND, et al., Defendants-Appellees.	)	No. IP 95 492 C B/S
	)	**Sarah Evans Barker,**
	)	Chief Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiffs-appellants on February 13, 1997, all of the judges on the panel have voted to deny rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

James Alexander TANFORD, Kimberly J. MacDonald, and David Suess, Plaintiffs,

v.

Dr. Myles BRAND, in his official capacities as President of Indiana University, and Dr. Kenneth R.R. Gros Louis, in his individual and official capacities as Vice President and Chancellor of Indiana University at Bloomington, Defendants.

No. IP 95-492 C B/S.
United States District Court,
S.D. Indiana,
Indianapolis Division.
July 15, 1996.

ENTRY

BARKER, Chief Judge.

Two graduations ago, plaintiffs filed the instant suit seeking to enjoin Indiana University ("IU") from using an invocation and benediction as part of its official university-wide commencement ceremony. On May 4, 1995, just days before the 1995 ceremony was scheduled to begin, we denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs were unlikely to prevail on the merits of their suit. Today, we reexamine those merits in more detail and, though the record is supplemented and the legal arguments refined, we confirm that earlier finding.

I. FACTUAL BACKGROUND.

The facts in this case are largely undisputed. Plaintiffs James Alexander Tanford, Kimberly MacDonald and David Suess are, respectively, a tenured law professor and

two Indiana University law students.[1] Joseph Urbanski, a recently-added plaintiff, is an undergraduate student who expects to graduate from IU in May of 1999. Defendant Myles Brand is the President of the University and defendant Kenneth R.R. Gros Louis is the Vice President and Chancellor of the University's Bloomington campus. The University is a state institution.

By all accounts, IU's graduation ceremonies are sizeable gatherings. The 1995 ceremony, for example, was held in the football stadium, approximately 5,000 students (out of a graduating class of 7,400) and 150 university officials participated, and between 30,000 to 35,000 people attended. Because of the numbers, students are graduated en masse from their particular schools, and only a few receive individual recognition. The parties agree that between 15% and 55% of graduating law students traditionally participate in this university-wide ceremony.

For over 150 years, the University has invited local clergy to give an invocation and a benediction as part of this ceremony. These prayers are typically recited by ordained ministers of mainstream religious denominations, selected from religious leaders active in the university community. Usually, if not always, the prayers include a reference to a deity.[2] During the ceremony, the cleric is

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[1]Apparently, while this case was pending, MacDonald graduated from the Law School and Suess completed his second year there.

[2]The benediction from the May 6, 1995 ceremony reads as follows: Let us pray. Gracious God we have gathered as dreamers. People who believe deep inside that things can be

introduced, and the audience is directed to stand during the prayers. The clergyperson, wearing university regalia (cap and gown) also sits on the dais with the University President and other University officials throughout the commencement ceremony.

As part of its graduation-day activities, the School of Law also conducts a second, smaller Recognition Ceremony for its graduates in the IU auditorium. At this ceremony, the University recognizes each of its graduates individually by calling their names and having them walk across the stage to receive their law degrees. Based on past experience, the law school approximates that between 75% to 90% of graduating law students participate, along with family members and friends. Unlike the university-wide ceremony, the law school ceremony does not include an invocation or benediction.

On April 18, 1995, plaintiffs filed the instant suit seeking to permanently enjoin the use of an invocation and benediction as part of the university-wide ceremony. Their one-count complaint alleges that IU's practice of including a prayer violates the Establishment Clause of the First Amendment to the United States Constitution. On February 21, 1996, plaintiffs moved for summary

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better. We have been called into being by you to make a difference. We like giving. Be with us as we endeavor to reach out to those who feel distance from the joy and the challenge of truth. We pray that we might touch with our learning those who feel that there is no hope, no reason to believe in life and love, and the possibility itself. Strengthen us for the journeys of mind, of heart, of spirit, of body, so that we might be right in truth for one another, and for our world. We ask this in the name of our common god. Amen. (Bolyard Supplemental Aff., Ex. A).

judgment, which under Rule 56(c) of the Federal Rules of Civil Procedure, is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.Proc. 56(c). The burden rests squarely on the party moving for summary judgment to show "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The nonmoving party responding to a properly made and supported summary judgment motion still must set forth facts showing that there is a genuine issue of material fact, that a reasonable jury could return a verdict in its favor and that the movant is not entitled to judgment as a matter of law. See Wolf v. City of Fitchburg, 870 F.2d 1327, 1329 (7th Cir.1989).

II. ANALYSIS.

The Establishment Clause of the First Amendment prohibits the establishment of religion in no uncertain terms: "Congress shall make no law respecting an establishment of religion ..." U.S. Const.Amend. I. From this simple beginning, however, much confusion and many lawsuits has ensued. As we emphasized in our entry denying plaintiffs' motion for a preliminary injunction, the purpose of the establishment prohibition is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." Lemon v. Kurtzman, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745 (1971). Yet "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." Id.

at 614, 91 S.Ct. at 2112. Indeed, a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." Lee v. Weisman, 505 U.S. 577, 597, 112 S.Ct. 2649, 2661, 120 L.Ed.2d 467 (1992).

Given the complexity of the task, it is perhaps not surprising that no single criterion adequately defines the fragile line that separates religious indoctrination from a simple accommodation of religion. The test of longest lineage, the so-called Lemon test,[3] has fallen into disfavor, yet "however frightening it might be to some, has not been overruled." Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 394, n. 7, 113 S.Ct. 2141, 2148 n. 7, 124 L.Ed.2d 352 (1993); see also Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 686 (7th Cir.1994). The Supreme Court case most analogous to the case at bar, Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), adopts a different analysis, though four of the five Justices in the majority either wrote or joined separate concurrences advocating other constitutional standards. Nevertheless, out of this complexity and confusion, two constants appear: (1) "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise," Lee, at 586, 112 S.Ct. at 2655, and (2) at most, the Constitution requires that state actions have a secular purpose, that they neither advance nor inhibit religion and that they do not produce excessive government entanglement with religion. Lemon, 403 U.S. at 612-13, 91 S.Ct. at 2112. Because

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[3]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

plaintiffs have not established as a matter of law that they are entitled to relief under either standard, their motion for summary judgment is denied.

A. THE COERCION TEST EMPLOYED IN LEE POSES NO OBSTACLE TO IU'S COMMENCEMENT CEREMONY.

In Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the Supreme Court held that a prayer delivered by a clergyman at a public middle school graduation ceremony violated the Establishment Clause. In the majority opinion written by Justice Kennedy, the Court emphasized that two factors controlled its decision: (1) "state officials direct[ed] the performance of a formal religious exercise;" and (2) "even for those students who object[ed] to the religious exercise, their attendance and participation in the state-sponsored religious activity [were] in a fair and real sense obligatory...." Id., at 586, at 2655. As a consequence of these two factors--i.e., state involvement coupled with coercion--"the State, in a school setting, in effect required participation in a religious exercise." Id. at 594, at 2659.

In this case, Lee's state involvement prong is easily satisfied. It is undisputed that University officials pick the date, time and locations for the various graduation ceremonies. They control the content and order of events. They decide whether the ceremony will include an invocation and benediction, and they choose the religious participant.[4] (Shoshana Watkins Dep., at pp. 7-8). University officials even set parameters, albeit general

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[4]"[T]his is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." Lee, at 586, 112 S.Ct. at 2655

ones, on the prayer's content. (Watkins Dep., at p. 13). Thus, because IU decided to have prayers at graduation, chose the religious participant and influenced the content of the prayer, there appears to be as much state involvement in this case as occurred in Lee.

Satisfaction of Lee's coercion prong, however, is a closer question. To be sure, Lee did not hold that invocations or benedictions always violate the Constitution when offered as part of any public ceremony. Rather, Justice Kennedy conducted a "delicate and fact-sensitive" inquiry that identified four factors contributing to the coercive nature of such prayers in that context. 505 U.S. at 597, 112 S.Ct. at 2661.

First, the Court emphasized that high school students perceive the involvement of their teachers, principals and friends in a religious exercise as inducing a participation they might otherwise reject. Though subtle and indirect, the Court reasoned, this pressure can be as real as overt coercion because adolescents are susceptible to pressure from their peers, as well as from their superiors.

Second, the Court held that adolescents are likely to view their acquiescence to the group ritual as an expression of participation. True, "in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others." Id., at 592, at 2658. Yet, "given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it." Id., at 592, at 2658.

Third, because reasonable adolescent dissenters could believe that the act of standing signifies participation, they would be placed "in the dilemma of participating, with all that implies, or protesting." 505 U.S. at 592, 112 S.Ct. at

2658. Given the immaturity of the student participants, however, the Court held that the force of peer pressure made protest unlikely.

Finally, the Court emphasized that high school students could not avoid the dilemma altogether by choosing to bypass the ceremony. Even though not required, attendance was not voluntary "in any real sense ... for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." 505 U.S. at 594, 112 S.Ct. at 2659.

Significantly, each of these factors relied at least in part on the "heightened concerns [associated] with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 505 U.S. at 592, 112 S.Ct. at 2658. To be sure, the majority's conception of what constitutes coercion was broad; coercion does not derive from any formal requirement conditioning the receipt of a diploma on attendance at or participation in the ceremony. Yet, in a practical sense, the coercion was held to be real; the involvement of school authorities, the reality of peer pressure, the importance of a high school graduation and the likelihood that a reasonable dissenter would interpret her silence as participation or approval (rather than as simple respect for the views of others) all combined to create the "reasonable perception" to an adolescent dissenter "that she is being forced by the State to pray in a manner her conscience" may not permit. Id., at 592, at 2658.

In this case, the concerns underlying the Court's decision in Lee are not present. Plaintiffs--unlike the junior and high school students in Lee--are adults. Each

has earned or is in the process of earning undergraduate or postgraduate degrees. Three of them--Tanford, Suess and MacDonald--have even been trained as lawyers, a discipline that demands the ability to think independently, to analyze arguments skeptically and to disregard social pressures, peer or otherwise. Indeed, it is difficult to imagine a more rigorous discipline in these respects than that imparted (or attempted to be imparted and implanted) in a legal education.

That plaintiffs have added Joseph Urbanski, an undergraduate, to the case does not change this conclusion. University graduates are purposefully exposed to a wider variety of ideas and beliefs than primary and secondary school students. Of course, many of these competing ideas, beliefs and value systems, "they find distasteful or immoral or absurd or all of these." Lee, at 590, 112 S.Ct. at 2657. Yet, in many respects, the very mission of higher education is to challenge basic values instilled during childhood at a time when an individual student has the intellectual maturity to choose between competing beliefs. As the Supreme Court summarized over twenty-five years ago: There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view.... The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the ... limitations [prohibiting religious instruction]. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influences by virtue of their own internal

disciplines. Tilton v. Richardson, 403 U.S. 672, 686, 91 S.Ct. 2091, 2099, 29 L.Ed.2d 790 (1971).[5]

In other words, the special solicitude for younger students traditionally shown by federal courts[6] is not required here. Unlike the adolescent plaintiffs in Lee, an adult dissenter who remains quietly seated should not "reasonab[ly] ... believe that the group exercise signifie[s] her own participation or approval" of the prayer or its

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[5]Courts and commentators alike have generally described primary and secondary schools as playing a different role from higher education: The central fact in the distinction between higher and lower education is the role of value inculcation in the teaching process. The public schools in the United States traditionally have viewed instilling the young with societal values as a significant part of the schools educational mission. Such a mission is directly opposed to the vision of education that underlies the premises of academic freedom in higher education. Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U.Pa.L.R. 1293, 1342-43 (1976).

[6]See Edwards v. Aguillard, 482 U.S. 578, 583-84, 107 S.Ct. 2573, 2577-78, 96 L.Ed.2d 510 (1987) (noting that because children in public schools are highly impressionable, schools must be careful about sending any religious message); Grand Rapids School Dist. v. Ball, 473 U.S. 373, 383, 105 S.Ct. 3216, 3222, 87 L.Ed.2d 267 (1985) ("the government's activities in this area [of religion in public schools] can have a magnified impact on impressionable young minds"); Widmar v. Vincent, 454 U.S. 263, 274 n. 14, 102 S.Ct. 269, 276-77 n. 14, 70 L.Ed.2d 440 (1981) (university students are young adults and "are less impressionable than younger students").

religious message, but rather her tolerance or respect for the views of others.[7] Nor is peer pressure likely to dissuade a college graduate from choosing to protest. Indeed, Professor Tanford, in the finest tradition of higher education, left the 1987 ceremony before the benediction, in part "hoping that people would ask me later why I had done it and that I then could ... engage them in a dialogue to explain my reasons." (Tanford Dep., pp. 47-48).[8]

In addition to the relative maturity of the participants and the unique role of the University, the coercive nature of IU's commencement is also lessened by the atmosphere of the ceremony itself. In contrast to a high school ceremony, which is highly controlled and "analogous to the classroom setting, where [the Court has] said the risk of compulsion is especially high," Lee, 505 U.S. at 595, 112 S.Ct. at 2660, IU's graduation is much less regulated. The 1995 ceremony, for example, encompassed 5,000 graduates and over 30,000 spectators in a football stadium. The ceremony, both by its size and program content, was

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[7]Professor Tanford essentially admits as much when he states that he does not "believe for a minute that all 7,000 people [who stood for the prayer] believed in the religious message" and that he was "certain there are a lot of people who did not intend by remaining to express agreement with the message." (Tanford Dep., pp. 39, 41).

[8]Similarly, MacDonald remained seated and took notes during the invocation and benediction at the 1994 ceremony. (MacDonald Dep., pp. 16- 17). Like Tanford, Suess has also absented himself during public prayers in the past. (Suess Dep., pp. 34-35).

impersonal; students were graduated en masse from their particular schools and only a few received individual recognition. Thousands of graduates chose not to attend. Undoubtedly, in a large, outdoor stadium, filled with thousands of graduates, a nonadherent could dissent without being noticed and without fear of being identified as a nonconformist. And, because people from all manner of backgrounds, races and religious creeds (including no religious creed) attend, individual acts of standing or remaining silent cannot be interpreted as expressions of a position on the theological merit of certain values, or of religious beliefs in general.

Moreover, because IU's commencement exercises actually involve multiple graduation ceremonies, plaintiffs have meaningful alternatives. Indeed, they can attend the smaller, more intimate law school ceremony, which does not contain an invocation or benediction, but does allow for "individual and personalized recognition" of each students' achievement in earning a degree. (Leonard Fromm Dep., p. 18). Perhaps for this reason, 75% to 90% of law students attend this smaller ceremony, compared to the 15% to 55% who attend the university-wide commencement.

In sum, the "symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as free and voluntary choice." Grand Rapids School Dist. v. Ball, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985). Since these concerns are not present at a university commencement involving thousands of graduates, multiple ceremonies, advanced degrees and well-defined personal and religious identities, Lee v.

Weisman does not require that we grant plaintiffs' motion for summary judgment. Accord Chaudhuri v. State of Tennessee, 886 F.Supp. 1374, 1386 (M.D.Tenn.1995) (the "Court finds that permitting a prayer to be offered at a public university's graduation ceremony ... presents no real threat of establishing religion").

B. LEMON'S THREE-PART TEST DOES NOT INVALIDATE IU'S USE OF PRAYER.

While Lee establishes the Establishment Clause's minimum protection, the Lemon test arguably demarcates the Constitution's outer limits. Under this test, a state action (1) must have a secular purpose, (2) must neither advance nor inhibit religion, and (3) must not produce excessive government entanglement with religion in order to pass constitutional muster. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

(1). Secular Purpose

The first Lemon factor asks if the challenged action has a secular purpose. Significantly, Lemon does not mandate that the government activity have an exclusively secular purpose; only one secular purpose need exist. Lynch v. Donnelly, 465 U.S. 668, 681 n. 6, 104 S.Ct. 1355, 1363 n. 6, 79 L.Ed.2d 604 (1984). However, if an obscure secular purpose is wholly dominated by a religious one, then the purpose prong is not satisfied. Id. at 690-91, 104 S.Ct. at 1368 (O'Connor, J., concurring).

In this case, we cannot say as a matter of law that the preeminent purpose of IU's invocation and benediction is religious. At a minimum, the prayer continues a 155-year-old tradition at the University, solemnizes a public occasion, "express[es] confidence in the future and encourag[es] the recognition of what is worthy of

appreciation in society." Id. at 693, 104 S.Ct. at 1369 (O'Connor, J., concurring).[9] Moreover, the purpose prong requires that the prayer be examined in the context of the entire ceremony. Id. at 679, 104 S.Ct. at 1362. Here, because the invocation and benediction comprise only a few minutes of an otherwise wholly secular ceremony, they simply do not have the same religious force as prayers offered during a worship service, or even at a baccalaureate ceremony. Thus, because a brief invocation/benediction serves the legitimate secular purpose of solemnizing a public ceremony and of continuing a 155-year old university tradition, plaintiffs have not satisfied the first prong of Lemon as a matter of law.

(2). Primary Effect to Advance Religion

Under the second prong of Lemon, the key inquiry is whether the university's decision to have an invocation and benediction sends primarily a message of endorsement or disapproval of religion. See Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337, 107 S.Ct. 2862, 2869, 97 L.Ed.2d 273 (1987); County of Allegheny v. ACLU, 492 U.S. 573, 592-93, 109 S.Ct. 3086, 3100-01, 106 L.Ed.2d

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[9]See also Jones v. Clear Creek Indep. School Dist., 977 F.2d 963, 967 (5th Cir.1992), cert. denied, 508 U.S. 967, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993) (finding secular purpose in high school graduation prayers); County of Allegheny v. ACLU, 492 U.S. 573, 595, n. 46, 109 S.Ct. 3086, 3102, n. 46 106 L.Ed.2d 472 (1989); but see Harris v. Joint School Dist. No. 241, 41 F.3d 447, 458 (9th Cir.1994) (finding no secular purpose in high school graduation prayers); ACLU v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1484-86 (3d Cir.1996).

472 (1989); Wallace v. Jaffree, 472 U.S. at 75, 105 S.Ct. at 2499. The "test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non- adherents as a disapproval, of their individual religious choices." School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985); see generally Lynch, 465 U.S. at 681-83, 104 S.Ct. at 1363-64 (city's inclusion of a creche in Christmas display did not have primary effect of endorsing religion).

In this case, given the non-sectarian and brief nature of the prayers, as well as the sophistication of the audience and the university setting, the benefit to one faith over another (or to religion in general) is at most indirect and incidental. Indeed, the very mission of the University is to expose developing young adults to a universe of new ideas and beliefs, most of which the University claims no special allegiance to. Thus, a 30-second prayer delivered as part of larger secular ceremony "would no more commit the University ... to religious goals than it is now committed to the goals of the Students for a Democratic Society [or] the Young Socialist Alliance." Widmar, 454 U.S. at 274, 102 S.Ct. at 276 (internal quotation marks omitted). In his deposition, Professor Tanford admits as much when he states that he does not view the non-sectarian prayer as endorsing any particular religion or influencing people's religious beliefs. See Tanford Depo. at 42-43. Thus, the court finds as a matter of law that plaintiffs have not satisfied Lemon's second prong.

(3). Excessive Entanglement

Lemon's third prong asks whether the challenged action creates an excessive entanglement between church and state. Supreme Court cases relying on the excessive entanglement prong to invalidate state actions have largely involved an enduring association between the government and religious institutions. Often the cases entail state aid to religious or parochial institutions for particular secular purposes. See, e.g., Lemon, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (state law that paid a portion of private school teachers' salaries for teaching secular subjects was excessive entanglement); Ball, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (sending government teachers to private schools to teach secular classes constituted excessive entanglement). Other cases have involved government delegations of power to religious bodies. See, e.g., Larkin v. Grendel's Den, 456 U.S. 913, 102 S.Ct. 1765, 72 L.Ed.2d 171 (1982) (statute giving church-affiliated schools power to veto nearby liquor licenses struck down as excessive entanglement).

In this case, the University's alleged monitoring of the graduation prayers consists of the selection of a cleric and a reminder to him or her to include an uplifting, general message. Such interaction does not require that "a particular religion ... endure the ongoing presence of state personnel whose primary purpose is to monitor" prayer contents in "an attempt to guard against the infiltration of religious thought." Aguilar v. Felton, 473 U.S. 402, 413, 105 S.Ct. 3232, 3238, 87 L.Ed.2d 290 (1985). Nor does it necessitate frequent, pervasive or burdensome contacts between University officials and local clergy. Thus, because the degree of entanglement in the instant case is relatively minor when compared with other Establishment

Clause cases, the court finds that plaintiffs have failed to satisfy any of Lemon's three prongs.

III. CONCLUSION.

In sum, plaintiffs have not demonstrated that they are entitled to summary judgment under either the coercion test set forth in Lee or the traditional Lemon test. Indeed, like the legislative prayers approved in Marsh, or the "government declaration of Thanksgiving as a public holiday, [or the] printing of 'In God We Trust' on coins, [or] opening court sessions with 'God save the United States and this honorable court,' Lynch, 465 U.S. at 693, 104 S.Ct. at 1369, a short ecumenical prayer at a university graduation amounts to nothing more than "a tolerable acknowledgement of beliefs widely held among the people of this county." Marsh, 463 U.S. at 792, 103 S.Ct. at 3336. Plaintiffs' motion for summary judgment must therefore be denied.

Moreover, though defendants have not yet moved for summary judgment, the Court concludes that judgment should be immediately entered in their favor. The facts relied upon by the Court, including the age of the plaintiffs, the atmosphere and overwhelmingly secular nature of the ceremony, the briefness of the prayer, the unique role of the University and the availability of alternative ceremonies, are undisputed. Defendants suggest that factual controversies relating to the feelings of awkwardness and distaste plaintiffs profess to have experienced during the ceremony preclude summary judgment in their favor. Such allegations of fact are uniquely unsuited to objective verification and, therefore, could not be the sole basis for requiring a trial. Whatever the intensity or sincerity of those feelings, however, they do not change the Court's legal analysis or conclusions.

Finally, this ruling on summary judgment is consistent with its conclusions and analysis in the order denying the motion for preliminary injunction. That order, therefore, is incorporated in this entry and, for all these reasons set forth above, plaintiffs' motion for summary judgment is DENIED.

It is so ORDERED.

James Alexander TANFORD, Kimberly J. MacDonald, and David Suess, Plaintiffs,

v.

Dr. Myles BRAND, in his individual and official capacities as President of Indiana University, and Dr. Kenneth R.R. Gros Louis, in his official capacities as Vice President and Chancellor of Indiana University at Bloomington,

Defendants.

No. IP 95-492 C B/S.

United States District Court,

S.D. Indiana,

Indianapolis Division.

May 4, 1995.

BARKER, Chief Judge.

Today we must answer a question explicitly left open by the Supreme Court in Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)--namely, whether a member of the clergy may offer prayers as part of a public university's graduation ceremony consistent with the Establishment Clause of the United States Constitution. Because Plaintiffs failed to demonstrate a likelihood of their succeeding on the merits, we deny their motion for preliminary injunctive relief.

I. FACTUAL BACKGROUND

Given the accelerated pace of this suit, the underlying facts are still somewhat under-developed. However, the following facts are largely undisputed. Plaintiffs James Alexander Tanford, Kimberly MacDonald and David Suess are, respectively, a tenured law professor and two

students[1] enrolled in Indiana University ("IU") law school at Bloomington, Indiana. Defendant Myles Brand is the President of the University and defendant Kenneth R.R. Gros Louis is the Vice President and Chancellor of the University's Bloomington campus. The University is a state institution.

For over 150 years, the University has invited clergy to give an invocation and a benediction as part of its official graduation ceremonies. These prayers are typically recited by ordained ministers of mainstream religious denominations, selected from religious leaders active in the university community. Usually, if not always, the prayers include a reference to a deity. During the ceremony, the cleric is introduced, and the audience is directed to stand during the prayers. The cleric, wearing university regalia (cap and gown) also sits on the dais with the University president and other University officials throughout the commencement ceremony.

The graduation ceremonies are held on University grounds. This year's university-wide ceremony is scheduled to begin at 10:00 A.M. on Saturday, May 6, in the football stadium. Based on past years' experience, the University expects approximately 30,000 people in attendance. There are 7,400 students on the Bloomington campus who are eligible for commencement. The University expects 5,000 of these graduating students to participate, along with their family and friends. Between 15% to 55% of graduating law students are expected to participate in the university-wide ceremony.

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[1]Plaintiff MacDonald is a graduating law student while plaintiff Suess is completing his first year of law school.

As part of the commencement activities, the School of Law conducts a second, smaller ceremony only for its graduates later in the day in the IU auditorium. At this ceremony, the University recognizes each of its graduates individually by calling their names and having them walk across the stage to receive their law degrees. Based on past experience, the law school expects 75% to 90% of graduating law students to participate. The law school ceremony does not include an invocation or benediction.

As part of their duties at the law school, professors are requested[2] from time to time and on a rotating basis to attend the university-wide ceremony in order to assist in the presentation of academic hoods to law school graduates. Although he has attended the ceremony only once during his fifteen years as a member of the IU faculty, Professor Tanford has agreed to attend this year's upcoming commencement. Neither at the university-wide commencement, nor the more intimate law school ceremony, are the two student plaintiffs subject to formal requirements to attend.

On April 18, 1995, Plaintiffs filed the instant suit seeking a preliminary injunction to enjoin the use of an invocation and benediction as part of IU's university-wide graduation ceremony. Their one count complaint alleges that IU's practice of including an invocation and benediction as part of its official graduation exercises violates the Establishment Clause of the First Amendment to the United States Constitution.

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[2]The parties stipulate that no explicit requirement is imposed on faculty to attend the commencement ceremony and no sanction flows from a failure to volunteer for such service

II. STANDING

Article III of the Constitution limits the power of this court to resolving cases and controversies. The doctrine of standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). At a minimum, standing requires that the plaintiff suffer an "injury in fact" that is fairly traceable to the challenged action of the defendant and the injury is likely to be redressed by a favorable decision. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

An "injury in fact" is an invasion of a legally-protected interest which is concrete and particularized, not conjectural or hypothetical. Doe v. County of Montgomery, 41 F.3d 1156, 1159 (7th Cir.1994). Significantly, [a] plaintiff who fails to identify any personal injury suffered as a consequence of the alleged constitutional error, "other than the psychological consequence presumably produced by observation of conduct with which one disagrees," has no standing under Article III. Id. Anything more than a psychological injury, however, is generally enough to confer standing. Indeed, when First Amendment rights are implicated, "an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973) quoted in Doe, 41 F.3d at 1159.

In light of this broad language, we fear in this context that the law of standing has taken on an almost metaphysical quality. One wonders how anyone can reliably and properly determine that the meaning and significance of standing if it is satisfied by an "identifiable trifle." Yet even under such an expansive interpretation, standing poses a significant obstacle to Plaintiffs' case.

Plaintiff David Suess, for example, is a twenty-eight year old student currently completing his first year of law school. He is not scheduled to graduate until May of 1997. He has been invited to commencement activities by some graduating friends and feels that, should he attend, the invocation and benediction will make him feel uncomfortable. We emphasize the uncertainty of his attendance because Mr. Suess has not yet decided whether he will attend the university-wide commencement. When asked in a deposition whether he would attend the university-wide commencement (the subject of this lawsuit) or the smaller law school ceremony later that day (which does not include an invocation or benediction), he replied: "Definitely the law school ceremony and quite possibly the commencement." (Suess Dep. at p. 32) (emphasis added). But it depends "partially on how things go with this and schedule conflicts." (Id. at p. 32).

From this admission, it is clear that Mr. Suess has no stake in this litigation. If he decides to stay home and miss the campus-wide ceremony, then he will simply have no "direct and unwelcome exposure to a religious message." Doe, 41 F.3d at 1159. If he decides to attend, he is no more than an observer with nothing at stake in the ceremony besides the "psychological consequence presumably produced by observation of conduct with which one disagrees." Valley Forge, 454 U.S. at 485,

102 S.Ct. at 765. Either way, Suess's alleged injury is even more theoretical than the interests found insufficient to confer standing in Freedom From Religion Foundation, Inc. v. Zielke, 845 F.2d 1463 (7th Cir.1988). In that case, the Seventh Circuit considered whether the plaintiffs had standing to challenge the constitutionality of a monument of the Ten Commandments in a city park. Because the plaintiffs did not alter their behavior as a result of the monument and failed to demonstrate that they were exposed to the monument during their normal routines or in the course of their usual driving or walking routes, the court affirmed the district court's dismissal for lack of standing. Id. at 1468-69. Thus, because Mr. Suess cannot demonstrate that he will be exposed to an unwelcome religious exercise, he lacks standing and is hereby dismissed.

Plaintiff James Tanford's stake, by contrast, falls squarely in the category of a "trifle," but apparently that suffices under current constitutional interpretations. As a tenured professor at the law school, Tanford states he is "obligated" to attend the university-wide commencement exercises, or at least the "hooding" portions of the ceremony, once every few years. He admits, however, that this obligation is not externally imposed in any way. Indeed, when asked by the Dean to "volunteer" for this duty in the past, Tanford has successfully avoided it; he has only attended the ceremony once in his fifteen years as a member of the law school faculty, and there has never been any threat of discipline as a result of not participating. Nevertheless, Professor Tanford unequivocally states that he plans to attend this year. Moreover, because he is a faculty member, his connection to the ceremony and his stake in its constitutionality are

more direct than the ephemeral injustice that Plaintiffs contend will allegedly be suffered by Mr. Suess, a mere observer. Thus, although his interest constitutes only a trifle, "an identifiable trifle is enough for standing." SCRAP, 412 U.S. at 689 n. 14, 93 S.Ct. at 2417 n. 14. We therefore permit him to remain in the suit "to fight out a question of principle." Id.

The basis for MacDonald's standing, by contrast, is on much firmer ground. Because she is currently completing her third and final year of law school, she will be graduated at this year's ceremony. Moreover, she has indicated her intention to attend. (MacDonald dep. at p. 43). Thus, MacDonald has demonstrated both a concrete stake in the constitutionality of the ceremony and also a strong likelihood of being directly exposed to an unwelcome religious exercise. Accordingly, we find that her interest in the litigation is sufficient to confer standing.

We emphasize, however, that MacDonald may not bootstrap her interest in the litigation from injuries that will allegedly be suffered by her two-year old daughter. MacDonald has sued strictly on her own behalf and not that of her daughter.[3]

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[3]Given the identities of the Plaintiffs, we have our doubts about whether this suit represents anything more than a clinical classroom exercise contrived by a law professor and two of his students. We therefore remind these parties, as well as all future litigants, that the machinery of the federal courts is not to be engaged merely to conduct "ingenious academic exercise[s] in the conceivable." Lujan, 504 U.S. at 566, 112 S.Ct. at 2139. However, as set forth above, in this case both Professor Tanford and Plaintiff Kimberly MacDonald, who will be graduated at the challenged ceremony, have shown a likelihood of establishing a

III. PRELIMINARY INJUNCTION STANDARD

In determining whether to grant preliminary injunctive relief, the Court must examine the following factors: (1) whether Plaintiff has a reasonable likelihood of success on the merits; (2) whether there are adequate remedies at law; (3) whether there will be irreparable harm if an injunction does not issue; (4) whether the balance of harms to the movant if an injunction is denied and to the opponent if the injunction is granted favors the movant; and (5) whether an injunction is adverse to the public interest. JAK Productions, Inc. v. Wiza, 986 F.2d 1080, 1084 (7th Cir.1993); Grossbaum v. Indianapolis-Marion County Building Authority, 870 F.Supp. 1450, 1453 (S.D.Ind.1994). The Court, "sitting as would a chancellor in equity, then weighs" these factors in deciding whether to grant the injunction. Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir.1992).

Although distinct in theory, these five elements essentially reduce to a discussion of the Plaintiffs' likelihood of success on the merits in this case. Indeed, irreparable harm is presumed to flow from violation of a constitutional right: "[T]he loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976); accord Shondel v. McDermott, 775 F.2d 859, 866-87 (7th Cir.1985). A conclusion that an injury is irreparable in turn establishes that there is no adequate remedy at law. Fleet Wholesale Supply v. Remington Arms Co., 846 F.2d 1095, 1098 (7th Cir.1988) ("To say that the injury is irreparable means

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perceptible, albeit fleeting, harm

that the methods of repair (remedies at law) are inadequate") (emphasis in original). Because governmental compliance with the Constitution always serves the common good, determination of the public interest also turns on the merits. Grossbaum, 870 F.Supp. at 1453. Finally, the balance of harms here does not tip decidedly on either side; the harms from an erroneous ruling flow equally in either direction.[4] Thus, our decision on the preliminary injunction is based on which side appears more likely to succeed on the merits.

IV. LIKELIHOOD OF SUCCESS ON THE MERITS

Concerning religion, the First Amendment both promises its free exercise and prohibits its establishment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. In crafting this provision of our Constitution, the Founding Fathers recognized, as must this Court, the tension between these rights. To deal with that tension they crafted their great compromise: free exercise, but no coercion.

The Supreme Court has explained that the purpose of the establishment prohibition is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." Lemon v. Kurtzman, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745

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[4]Indeed, as Defendants concede, in weighing the relative harms, the Court must focus "on the risk of an erroneous decision." (Brief in Opposition, p. 10); see also Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11-13 (7th Cir.1992). Whether our decision is erroneous or not is again tied up with--though not entirely dependent upon--our examination of the merits.

(1971). Indeed, the federal courts have often used Thomas Jefferson's metaphor of a wall of separation between church and state to emphasize "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." Lee v. Weisman, 505 U.S. 577, ----, 112 S.Ct. 2649, 2656, 120 L.Ed.2d 467 (1992).

At the same time, however, we recognize that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." Lemon, 403 U.S. at 614, 91 S.Ct. at 2112. Indeed, as noted earlier, the Constitution affirmatively mandates the seemingly contradictory goal that government accommodate the free exercise of religion. See Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). Over forty years ago the Supreme Court held that: When the state encourages religious instruction or cooperation with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. Zorach v. Clauson, 343 U.S. 306, 313-14, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952). Thus, in every Establishment Clause case, the Court "must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total

separation of the two is not possible." Lynch, 465 U.S. at 672, 104 S.Ct. at 1359.

A. Lee v. Weisman--State Involvement + Coercion

With these principles in mind, we now turn to a consideration of recent Supreme Court precedent in the case of Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). There, the Supreme Court held that a prayer delivered by a clergyman at a public middle school graduation ceremony violated the Establishment Clause. In the majority opinion written by Justice Kennedy, the Court noted that two facts controlled its decision: (1) "state officials direct[ed] the performances of a formal religious exercise;" and (2) "even for those students who object[ed] to the religious exercise, their attendance and participation in the state-sponsored religious activity [were] in a fair and real sense obligatory." 505 U.S. at ----, 112 S.Ct. at 2655.

Concerning the first controlling fact, the Court stated that the school principal's extensive involvement in deciding to have prayers at graduation, in choosing the religious participant, and in controlling the content of the prayer rendered the graduation a "state-sponsored religious exercise." 505 U.S. at ---- - ----, 112 S.Ct. at 2655-58. That the school attempted to make the prayers nonsectarian was not controlling. Although such measures may lessen a prayer's divisive impact, the Constitution does "not permit school officials to assist in composing prayers as an incident to a formal exercise for their students." 505 U.S. at ----, 112 S.Ct. at 2657.

As to the second dominant fact, the Court reasoned that graduation prayers constituted governmental coercion because the state "in effect required participation in a religious exercise." 505 U.S. at ----, 112 S.Ct. at 2659.

The majority conducted a "delicate and fact-sensitive" inquiry that identified several factors contributing to the coercive nature of the ceremony. 505 U.S. at ---, 112 S.Ct. at 2661. Significantly, each factor relied at least in part on the "heightened concerns [associated] with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 505 U.S. at ---, 112 S.Ct. at 2658 (emphasis added).

Initially, the Court emphasized that high school students perceive the involvement of their teachers, principals and friends in a religious exercise as inducing a participation they might otherwise reject. According to the Court: The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. 505 U.S. at ---, 112 S.Ct. at 2658. The Court maintained that this pressure, to act, although subtle and indirect, can be as real as overt coercion to adolescents susceptible to pressure from their peers. Although the Court recognized that standing with the group or remaining silent can signify "simple respect for the views of others," 505 U.S. at ---, 112 S.Ct. at 2658, it argued that adolescents are likely to view their acquiescence to the group ritual as an expression of participation: What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it. 505 U.S. at ---, 112 S.Ct. at 2658. Thus, in the environment of a middle school (and presumably a high school) graduation ceremony, there is a dual risk: the risk that a reasonable dissenter

would feel compelled to conform her behavior to that of the other participants, and the concomitant risk that the adolescent dissenter would interpret her conformity as manifesting an approval of or participation in the group exercise.

Because reasonable dissenters could believe that the act of standing or remaining silent signifies participation, they would be placed "in the dilemma of participating, with all that implies, or protesting." 505 U.S. at ----, 112 S.Ct. at 2658. The Court reasoned, however, that the force of peer pressure made protest unlikely. To be sure, attendance at the ceremony was not required. Thus, dissenting students could try to avoid the dilemma altogether by not attending the graduation ceremony. The Court, however, found that this did not excuse any inducement or coercion in the ceremony itself: [T]o say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.... Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. 505 U.S. at ----, 112 S.Ct. at 2659. Thus, even though not required, attendance is not voluntary "in any real sense ... for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." 505 U.S. at ----, 112 S.Ct. at 2659.

At a minimum, then, the Lee majority held that "the Constitution guarantees that government may not coerce anyone to support or participate in religion." 505 U.S. at ----, 112 S.Ct. at 2655. To be sure, the majority's conception of what constitutes coercion was broad; coercion derives not from any formal requirement conditioning the receipt of a diploma on attendance at the

ceremony, but from the state's apparently more subtle attempt "to exact religious conformity from a student as the price of attending her own high school graduation." 505 U.S. at ----, 112 S.Ct. at 2660.

The Court specifically avoided deciding the issue presented in this case; namely, whether adults at a university commencement who object would also feel compelled to participate: We do not address whether [the dilemma of conforming or protesting] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. 505 U.S. at ---- - ----, 112 S.Ct. at 2658-59 (emphasis added). Nevertheless, a careful reading of Lee yields no constitutional impediments to the ceremony at issue in this case.

(1). State Involvement

The first prong of Lee requires that there be sufficient state involvement in the graduation ceremony to render it a "state-sponsored religious exercise." That requirement was satisfied in Lee because the school principal had decided to include prayers in the ceremony, chosen the religious participant, and influenced the content of the prayer. Based upon the record as it now exists, we think that this case is indistinguishable from Lee on this point.

Above all, a graduation ceremony is a university-controlled event. University officials pick the date, time and locations for the various ceremonies. They control the content and order of events. They also decide whether the ceremony will include an invocation and benediction: [T]his is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. 505 U.S. at ----, 112

S.Ct. at 2655; see Dep. of Shoshana Watkins, at pp. 7-8. Moreover, a university official chooses the religious participant. This year the invited clergyman is the Reverend Robert W. Sims, a priest with St. Paul's Catholic Center. (Bolyard Aff. P 8). Finally, a university official sets parameters on the prayer's content. Typically, these parameters involve a simple reminder to the clergyperson to recognize that the audience will be diverse and to make his or her remarks "unifying and uplifting for all." (Watkins Dep., at p. 13). Thus, "[g]iven that graduation is ultimately a school-controlled, school-sponsored event, there appears in this case to be just as much state involvement as appeared in" Lee. Harris v. Joint School Dist. No. 241, 41 F.3d 447, 454 (9th Cir.1994).

(2). Coercion

The second prong of Lee requires a showing of coercion. As discussed above, Justice Kennedy's explication of what constitutes coercion was broad, recognizing that state action can have coercive effects even when it does not involve formal demands or formal sanctions. Yet even under this expanded view, we think that in this respect it is unlikely that Plaintiffs will prevail on the merits.

Undeniably, the plaintiffs here--unlike the junior and high school students in Lee--are mature adults who have either earned or are in the process of earning postgraduate degrees--law degrees, no less! Professor Tanford, for example, is forty-five years old and a tenured law professor. Kimberly MacDonald is twenty-four years old and is about to complete her third and final year of law school. Each has chosen a discipline where a central and valued skill is the ability to think independently and listen

critically. Each is trained to analyze arguments skeptically and not to be subtly coerced by pressure, peer or otherwise. It is difficult to imagine a more rigorous discipline in these respects than that imparted (or attempted to be imparted and implanted) in legal education. Indeed, it is a lawyer's stock and trade.

Thus, unlike the adolescent plaintiffs in Lee, the Plaintiffs here are simply not the type of impressionable youth who deserve the special protection of the federal courts. Each has well-developed personal and religious identities. On an objective basis, the Court can and does conclude that they will not be easily pressured into conforming their actions to those of the other participants. Nor is protest an unrealistic alternative for them.[5] Thus, the "dilemma of participating ... or protesting" never materializes. 505 U.S. at —, 112 S.Ct. at 2658.

Nor are the well-defined identities of these plaintiffs different in kind from the experiential development of college students in general. University graduates are purposefully exposed to a wider variety of ideas and beliefs than primary and secondary school students. It is part and parcel of what it means to be educated. Many of these competing ideas, beliefs and value systems, "they find distasteful or immoral or absurd or all of these."

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[5]Indeed, both Professor Tanford and Ms. MacDonald have shown the ability to voice dissent in such matters in the past. For example, the last time Professor Tanford attended the university-wide ceremony, he absented himself from the ceremony when the invocation began, returned for the middle part, and left again before the closing benediction. Ms. MacDonald attended a prior ceremony but remained seated during these portions

Lee, 505 U.S. at ----, 112 S.Ct. at 2657.[6] In many significant ways, the very mission of higher education is to challenge basic values instilled during childhood at a time when the individual student has the intellectual maturity to choose between competing beliefs.[7]

Thus, the special solicitude for younger students traditionally shown by federal courts is not required here: There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view.... The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency

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[6]The Supreme Court has stated that exposure to competing value systems is essential to our system of self-government: The [college] classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967) (citation omitted).

[7]Courts and commentators have generally described primary and secondary schools as playing a different role from higher education: The central fact in the distinction between higher and lower education is the role of value inculcation in the teaching process. The public schools in the United States traditionally have viewed instilling the young with societal values as a significant part of the schools educational mission. Such a mission is directly opposed to the vision of education that underlies the premises of academic freedom in higher education. Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U.Pa.L.R. 1293, 1342-43 (1976).

to subvert the ... limitations [prohibiting religious instruction]. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influences by virtue of their own internal disciplines. Tilton v. Richardson, 403 U.S. 672, 686, 91 S.Ct. 2091, 2099, 29 L.Ed.2d 790 (1971); see also Edwards v. Aguillard, 482 U.S. 578, 583-84, 107 S.Ct. 2573, 2577-78, 96 L.Ed.2d 510 (1987) (noting that because children in public schools are highly impressionable, schools must be careful about sending any religious message); Grand Rapids School Dist. v. Ball, 473 U.S. 373, 383, 105 S.Ct. 3216, 3222, 87 L.Ed.2d 267 (1985) ("the government's activities in this area [of religion in public schools] can have a magnified impact on impressionable young minds"); Widmar v. Vincent, 454 U.S. 263, 274 n. 14, 102 S.Ct. 269, 276-77 n. 14, 70 L.Ed.2d 440 (1981) (university students are young adults and "are less impressionable than younger students").

The atmosphere of a university graduation is also different from that of a high school graduation. At a high school graduation: teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit. Lee, 505 U.S. at —, 112 S.Ct. at 2660 (citations omitted). In other words, the ceremony is highly controlled and "analogous to the classroom setting, where [the Court has] said the risk of compulsion is especially high." Id.

IU's graduation, by contrast, has a much less formal setting. At the university-wide ceremony, there will be 5,000 graduates and 30,000 spectators in a football stadium. People from all manner of backgrounds, races and religious creeds (including no religious creed) will attend. The ceremony, both by its size and program content, is impersonal. Students are graduated en masse from their particular school with only a few receiving individual recognition. Thousands of graduates do not attend. In a large stadium filled with thousands of graduates, a nonadherent could dissent without being noticed and without fear of being identified as a nonconformist. Nor will individual acts of standing or remaining silent necessarily be construed as expressing a position on the theological merit of certain values or of religious beliefs in general.

Moreover, IU's commencement exercises actually involve multiple graduation ceremonies. Thus, Plaintiffs have meaningful alternatives. Indeed, they can attend the admittedly more intimate law school ceremony. That ceremony does not contain an invocation or benediction, but does allow for "individual and personalized recognition" of each students' achievement in earning a degree. (Dep. of Leonard Fromm, at p. 18). Perhaps for this reason, 75% to 90% of law students attend this ceremony.

Using language from Lee, Plaintiffs argue in response that the University's inclusion of an invocation and benediction "forces [them] to choose between participating in prayers that they find offensive" or missing the graduation ceremony. (Brief in Support, p. 4). However, as Justice Kennedy expressly stated in Lee: We do not hold that every state action implicating religion is invalid

if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. Lee, 505 U.S. at ----, 112 S.Ct. at 2661. Therefore, Plaintiffs must provide more than a simple allegation that a nonadherent feels awkwardness during a religious exercise. There needs to be an additional showing that the state's involvement in the religious exercise is likely to induce an observer's reluctant participation, or to make dissent an unlikely alternative, or to influence the development of an unformed religious identity, or all of the above. Given the advanced mental and social abilities of these plaintiffs, however, as explained above, there is no such risk here.

In sum, the "symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as free and voluntary choice." Grand Rapids School Dist. v. Ball, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985).[8] Since these concerns are not present at a university commencement involving thousands of graduates, multiple ceremonies, advanced degrees and well-defined personal and religious identities, we find that

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[8]See also Brandon v. Bd. of Education, 635 F.2d 971, 978 (2d Cir.1980) ("Our nation's elementary and secondary schools play a unique role in transferring basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit").

Plaintiffs are unlikely to prevail on the merits under Lee v. Weisman.

B. The Lemon Test--Its Application, If Any.

For two decades prior to Lee, the Supreme Court applied the now much maligned Lemon test to Establishment Clause cases. Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Reliance on Lemon for determination of Establishment Clause violations, however, has noticeably declined in the last decade. At least three of the Supreme Court's most recent decisions have either ignored Lemon or openly disparaged it. See Board of Education of Kiryas Joel Village School Dist. v. Grumet, --- U.S. ----, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993); Lee, 505 U.S. at ----, 112 S.Ct. 2649. And over the years, at least five currently sitting Justices have called for the elimination of Lemon as a general purpose test for all Establishment Clause cases. See Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384, ----, 113 S.Ct. 2141, 2150, 124 L.Ed.2d 352 (1993) (listing cases) (Scalia, J., dissenting). Lee itself expressly side-stepped the issue, stating that the constitutionality of the religious activity in that case could be judged without reference to Lemon. 505 U.S. at ----, 112 S.Ct. at 2655.

Most likely, Lemon's unitary test will some day be replaced by a series of category-specific rules. See Grumet, --- U.S. at ---- - ----, 114 S.Ct. at 2499-2500 (O'Connor, J., concurring). Presumably, under such an approach, future cases involving official public occasions with religious components will be governed by Lee v. Weisman. Indeed, because "Lemon was not devised to identify prayer smuggled into civic exercises," this Court

is similarly "not disposed to resolve this case by parsing Lemon." Sherman v. Community Consol. School Dist. 21, 980 F.2d 437, 445 (7th Cir.1992).

We emphasize, however, that a district court's role is not that of prophet, but rather that of disciple. We are bound by existing precedents, even when they are ambiguous and contradictory and difficult to divine. Since Lee v. Weisman, several Seventh Circuit decisions have addressed the question of Lemon's viability and have concluded that it remains the governing test in Establishment Clause cases absent any express overruling by the Supreme Court. See Carter v. Peters, 26 F.3d 697 (7th Cir.1994); Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680, 686 (7th Cir.1994); Sherman v. Community Consol. School Dist. 21 of Wheeling Tp., 8 F.3d 1160, 1164 n. 9 (7th Cir.1993), cert. denied, — U.S. —, 114 S.Ct. 2109, 128 L.Ed.2d 669 (1994); Cohen v. City of Des Plaines, 8 F.3d 484 (7th Cir.1993), cert. denied, — U.S. —, 114 S.Ct. 2741, 129 L.Ed.2d 861 (1994); Gonzales v. North Tp. of Lake County, Ind., 4 F.3d 1412, 1418 (7th Cir.1993); Berger by Berger v. Rensselaer Cent. School Corp., 982 F.2d 1160, 1162 (7th Cir.1993), cert. denied, — U.S. —, 113 S.Ct. 2344, 124 L.Ed.2d 254 (1993); see also Lamb's Chapel v. Center Moriches Union Free School Dist., — U.S. —, —, n. 7, 113 S.Ct. 2141, 2148 n. 7, 124 L.Ed.2d 352 (1993) ("Lemon, however frightening it might be to some, has not been overruled."). Moreover, of the two circuit courts to visit the issue of commencement prayers since Lee, both have applied Lemon. See Harris v. Joint School Dist. No. 241, 41 F.3d 447 (9th Cir.1994); Jones v. Clear Creek Indep. School Dist., 977 F.2d 963, 967 (5th Cir.1992), cert. denied, — U.S. —, 113 S.Ct. 2950, 124

L.Ed.2d 697 (1993). Thus, being faithful to our charge, we now turn to Lemon for whatever guidance it must provide.

In Lemon, the Supreme Court set forth a three-part test for determining the constitutionality of state action challenged under the Establishment Clause. First, the state action must have a secular purpose. Second, its primary purpose must neither advance nor inhibit religion. Third, the state action must not produce excessive government entanglement with religion. Id. 403 U.S. at 612-13, 91 S.Ct. at 2111. The first two criteria require that the government remain neutral[9] with respect to religion:

The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid. Wallace v. Jaffree, 472 U.S. 38, 56 n. 42, 105 S.Ct. 2479, 2490 n. 42, 86 L.Ed.2d 29

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[9]In that very terminology lies one of the most vexing analytical and application problems with the Lemon test, of course. Government neutrality turns out to be illusory--a posture almost impossible to establish and maintain. It is a rare act or event or practice that does not pull one either toward or away favoring or disfavoring, advancing or inhibiting, the "religious" purpose. And Lemon's mandate to remain neutral and reach equilibrium inevitably entails the pendulum's movement in one direction or the other.

(1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 690, 104 S.Ct. 1355, 1368, 79 L.Ed.2d 604 (1984)).

(1). Secular Purpose

The Supreme Court has recognized that Lemon does not mandate that the government activity have an exclusively secular purpose; rather, Lemon only requires that at least one secular purpose exist. See Lynch v. Donnelly, 465 U.S. 668, 681 n. 6, 104 S.Ct. 1355, 1363, n. 6, 79 L.Ed.2d 604 (1984). However, the purpose prong "is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes." Lynch, 465 U.S. at 690-91, 104 S.Ct. at 1368. Nonetheless, several courts have acknowledged that certain kinds of prayer serve the secular purpose of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." Lynch, 465 U.S. at 693, 104 S.Ct. at 1369-70 (O'Connor, J., concurring); see also Jones v. Clear Creek Indep. School Dist., 977 F.2d 963, 967 (5th Cir.1992), cert. denied, 508 U.S. 967, 113 S.Ct. 2950, 124 L.Ed.2d 697 (1993) (finding secular purpose in high school graduation prayers); County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 595, n. 46, 109 S.Ct. 3086, 3102, n. 46 106 L.Ed.2d 472 (1989).[10]

In this case, the Court finds persuasive those cases that have determined solemnization to be a secular purpose of graduation prayer and concludes that the benediction and

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[10]But see Harris v. Joint School Dist. No. 241, 41 F.3d 447, 458 (9th Cir.1994), petition for cert. filed, 63 USLW 3599 (Jan. 31, 1995) (finding no secular purpose in high school graduation prayers).

invocation at issue here serve such a function. We do not find that the preeminent purpose of the invocation and benediction in question to be religious. The religious nature of a prayer is largely determined by the context of which it is a part, the entity to whom it is addressed, and the participants in it. A ceremonial prayer led by the President of the United States or by the Chaplain of Congress does not have the same religious content as a prayer offered during a particular religious body's worship services. Prayer at a university-wide commencement, which lasts a few seconds and comprises a minute portion of the overall ceremony, differs substantially from prayer at a baccalaureate service, which is expressly religious. Moreover, the Court finds compelling the secondary secular purpose of continuing to include an invocation and benediction as part of a 155-year old university tradition. See Marsh v. Chambers, 463 U.S. 783, 786, 790, 792, 103 S.Ct. 3330, 3333, 3335, 3336, 77 L.Ed.2d 1019 (1983). For these reasons, the Court holds that the secular purpose prong of the Lemon test has been satisfied.

(2). Primary Effect to Advance Religion

Under the second prong of Lemon, the key inquiry is whether the university's decision to have a commencement invocation and benediction sends primarily a message of endorsement or disapproval of religion. See Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337, 107 S.Ct. 2862, 2869, 97 L.Ed.2d 273 (1987) ("[T]o have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence."); County of Allegheny v. ACLU, 492 U.S. 573, 592-93, 109 S.Ct. 3086, 3100-01, 106 L.Ed.2d 472 (1989); Wallace v. Jaffree, 472 U.S. at

75, 105 S.Ct. at 2499; Lynch, 465 U.S. at 692, 104 S.Ct. at 1369 (O'Connor, J., concurring). In School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985), the Supreme Court observed that "an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices."

In this case, given the non-sectarian and brief nature of the invocation and benediction, as well as the sophistication of the audience and the university setting, we find that adherents and nonadherents alike could not perceive the two prayers as either endorsing or denigrating their particular religious choices or religion generally. See Jones, 977 F.2d at 967 (finding that because a student-led prayer did not increase the religious conviction among graduation attendees by attracting new believers or increasing faith of faithful, effects prong was satisfied). To hold otherwise is to ignore that the educative mission of the University is to expose developing young adults to a universe of new ideas and beliefs, most of which the University claims no special allegiance to. Unlike elementary and secondary school children for whom courts have repeatedly shown heightened concern, see Ball, 473 U.S. at 390, 105 S.Ct. at 3226; Fleischfresser, 15 F.3d at 686; Sherman, 8 F.3d at 1166, adults who have matriculated to the university level and particularly Plaintiffs, who have completed graduate-level training, do not require the Court's protection: University students are, of course, young adults. They are less impressionable

than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. Widmar, 454 U.S. at 274 n. 14, 102 S.Ct. at 276-77 n. 14 (internal quotations and citation omitted). Thus, a 30-second prayer delivered as part of larger secular ceremony "would no more commit the University ... to religious goals than it is now committed to the goals of the Students for a Democratic Society [or] the Young Socialist Alliance." Id. at 274, 102 S.Ct. at 276 (internal quotation marks omitted). Indeed, Professor Tanford, an adherent of the Roman Catholic faith, has admitted as much when he stated that he does not view the non-sectarian prayer as endorsing any particular religion or influencing people's religious beliefs. See Tanford Depo. at 42-43.

The Court realizes that there are situations where benedictions or invocations could become so sectarian, fervent or dogmatic as to send a message of disapproval of non-adherents' beliefs.[11] Even Plaintiffs seem to expect, however, that the brief invocation and benediction at issue here will not be of that nature.[12] Thus, based on the factual record before us, the Court finds that the Plaintiffs

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[11]Although it is reasonable to assume that Indiana University would have altered its practices at each of its satellite campuses had the outcome of this motion been different, we emphasize that the invocations and benedictions recited at IU's other campuses are not before us. Rather, Plaintiffs constructed their lawsuit to challenge only the Bloomington campus' university-wide ceremony.

[12]Professor Tanford, for example, describes the prayers as merely "offensive" because they represent a "watered down nonsectarian civic religion." (Tanford Dep. at p. 28).

have not demonstrated a likelihood of succeeding on the second prong of Lemon.

(3). Excessive Entanglement

Plaintiffs maintain that the invocation and benediction violate the excessive entanglement prong of the Lemon test because the University would be required to monitor the content of the prayers in order to ensure that inappropriate prayers are not given. Defendants respond that any monitoring is at most de minimis because the university's involvement is limited to inviting the clergypersons and giving general suggestions that the invocation and benediction be uplifting.

In Lemon, the Supreme Court considered whether a Rhode Island statute paying a portion of private school teachers' salaries for their secular classes constituted excessive entanglement. The Court explained that the excessive entanglement inquiry encompasses an examination of "the character and purposes of the institution that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authorities." Lemon, 403 U.S. at 613, 91 S.Ct. at 2111. Because the state would have to ensure that the money was not being used for religious purposes, the Court concluded that "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected." Id. at 616, 91 S.Ct. at 2113.

Since Lemon, Supreme Court cases relying on the excessive entanglement prong have largely involved an enduring association between state and religious institutions. Often the cases involved state aid to religious or parochial institutions for particular secular purposes.

See, e.g., Lemon, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745; Ball, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (sending government teachers to private schools to teach secular classes constituted excessive entanglement). Other cases have involved government delegations of power to religious bodies. See, e.g., Larkin v. Grendel's Den, 456 U.S. 913, 102 S.Ct. 1765, 72 L.Ed.2d 171 (1982) (statute giving church-affiliated schools power to veto nearby liquor licenses struck down as excessive entanglement).

Thus, in light of this caselaw, the Court finds that the mere presence of a religious figure on the commencement stage is not excessive entanglement. In order for the entanglement to be excessive, the interplay between church and state must be more pervasive and burdensome. Nor is the limited influence that University officials traditionally exercise over the content of the prayers excessive. The University's alleged monitoring of the graduation cleric's prayers simply consists of the selection of a cleric and a reminder to him or her to include an uplifting, general message. Such interaction does not require that "a particular religion ... endure the ongoing presence of state personnel whose primary purpose is to monitor" prayer contents in "an attempt to guard against the infiltration of religious thought." Aguilar v. Felton, 473 U.S. 402, 413, 105 S.Ct. 3232, 3238, 87 L.Ed.2d 290 (1985). Nor does it necessitate frequent contacts between University officials and local clergy. Thus, because the degree of entanglement in the instant case is relatively minor when compared with other Establishment Clause cases, the Court finds that Plaintiffs are unlikely to succeed on the merits of prong three.

In short, we find that the Plaintiffs have failed to establish a likelihood of succeeding on the merits under any of Lemon's three prongs.

V. CONCLUSION

The issues presented by this motion are both legally and philosophically difficult. The caselaw, as well as our consciences, require that we honor two competing precepts: that what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce in the hands of the government; and almost paradoxically, that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." Lee, 505 U.S. at ----, 112 S.Ct. at 5661. As the Supreme Court's splintered opinions and seemingly inconsistent results in this area imply, the line between religious indoctrination and government accommodation is often obscure or illusory. Nevertheless, the true measure of constitutional adjudication "is the ability and willingness to distinguish between real threat and mere shadow." Abington School Dist. v. Schempp, 374 U.S. 203, 308, 83 S.Ct. 1560, 1616, 10 L.Ed.2d 844 (1963).

Given the difficulty of the task and the procedural posture of the case, the Court reminds the parties that our decision today may not be our final word on this matter. Yet we caution both sides not to become so dazzled by the art of their craft that a mutually beneficial accommodation is ignored. Both sides' briefs are replete with common sense arrangements that could be made, thus obviating the need for further court supervision. The Court does not mean to suggest that the appropriateness of a benediction at IU's commencement is not a legitimate issue for discussion. The best oracle for the declaration of religious

norms, however, is in the community itself and not the federal courthouse.[13] Thus, for the reasons stated above, we DISMISS FOR LACK OF STANDING Plaintiff David Suess and DENY Plaintiffs' motion for a preliminary injunction.

It is so ORDERED.

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[13]In this respect, the Court joins in the sentiments of Judge Guy of the Sixth Circuit: In this age, [a state-sponsored religious activity] might reflect some insensitivity to the diversity that is now America. But let us tackle the problem with some good old Yankee ingenuity--lobby for a course in comparative religions; ... form a Zen Buddhist club; wear a t-shirt proclaiming the virtues of agnosticism; but, if I am permitted to use the expression, for heavens's sake, stay out of the courthouse and quit trivializing the Constitution. Washegesic v. Bloomingdale Public Schools, 33 F.3d 679, 685 (6th Cir.1994) (Guy, J., concurring).

No. 96-1894

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JAMES A. TANFORD and JOSEPH ANTHONY URBANSKI,

Petitioners,

vs.

MYLES BRAND, in his individual and official capacities as President of Indiana University, and KENNETH R. R. GROS LOUIS, in his individual and official capacities as Vice President and Chancellor of Indiana University at Bloomington,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DOROTHY J. FRAPWELL
University Counsel
MICHAEL A. KLEIN
Associate University Counsel
Bryan Hall 211
Indiana University
Bloomington, Indiana 47405
(812) 855-9739

STANLEY C. FICKLE
Counsel of Record
ROBERT P. JOHNSTONE
BARNES & THORNBURG
11 South Meridian Street
Indianapolis, Indiana 46204
(317) 638-1313

Attorneys for Respondents

QUESTION PRESENTED

Whether Indiana University's 155-year tradition of inviting a local religious leader familiar with the university community to give an invocation and benediction to open and close the Commencement Ceremony on its Bloomington campus violates the Establishment Clause.

LIST OF PARTIES

James Alexander Tanford, Kimberly J. MacDonald, David Suess and Joseph Anthony Urbanski were the plaintiffs-appellants in the court below. Dr. Myles Brand, in his individual and official capacities as President of Indiana University, and Dr. Kenneth R.R. Gros Louis, in his individual and official capacities as Vice President and Chancellor of Indiana University at Bloomington, were the defendants-appellees.

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STATEMENT OF THE CASE

The Seventh Circuit affirmed the district court's ruling that inclusion of a brief, nonsectarian invocation and benediction during Indiana University's Commencement Ceremony on its Bloomington campus does not violate the Establishment Clause of U.S. Const. amend. I. The following facts are established by uncontroverted summary judgment evidence. Pursuant to Sup. Ct. Rule 15.2, misstatements of facts in the petition for writ of certiorari ("Petition") are also noted.

A. Commencement Activities And Commencement Ceremony.

Commencement on Indiana University's Bloomington campus consists of a wide range of activities, which begin on Friday afternoon with the Senior Class Tree Dedication and Graduation Send-Off at the President's Home. This is followed by other activities in the afternoon and evening, including special events by various schools for graduates and their families. On Saturday the activities continue with a University-wide Commencement Ceremony in Memorial Stadium (the football stadium) during the morning, followed by special events throughout the day by other schools for graduates and families. There are also a variety of public displays and exhibits throughout the three-day weekend.

Approximately 30,000 to 35,000 people attend the Saturday morning Commencement Ceremony. All graduating students are invited to this University-wide ceremony in the football stadium. However, attendance is voluntary, and there is no penalty of any sort for students who chose not to attend. Of approximately 7,400 graduating students in undergraduate and graduate schools, the University estimates that about 5,000 attend.

The Commencement Ceremony begins with an academic procession of approximately 5,000 graduating students and 150 university officials and faculty members. The students and faculty are then seated on chairs placed on the football field. The 25,000 to 30,000 visitors and guests are seated in the permanent football stadium seats. The ceremony consists of the national anthem, an invocation, an address by the commencement speaker,[1] the conferral of honorary degrees, the presentation of the class, student remarks, the charge to the graduating class, the conferral of degrees, the induction ceremony, the singing of "Hail to Old IU," and a benediction.[2]

As part of the Commencement activities, the School of Law conducts a Recognition Ceremony for its graduates and their families and friends on Saturday afternoon in the Indiana University Auditorium. This annual ceremony is much smaller than the University-wide ceremony and gives the law school an opportunity to recognize each of its graduates individually on the stage of the auditorium. In 1995 the law graduates were addressed by Attorney General Janet Reno. The law school also hosts a School of Law Luncheon for its graduating students and their families. These law school functions do not have an invocation or benediction. Historically, 15% to 55% of the students graduating from the law school have attended the University-wide Commencement Ceremony (as opposed to the separate law school ceremony).

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[1] In 1995, the commencement speaker was former United States Senator Birch Bayh.

[2] If the weather is adverse, the Commencement Ceremony may be held in two sessions in Assembly Hall (the basketball fieldhouse), with graduates and faculty seated on chairs on the basketball floor and guests in the permanent fieldhouse seats.

B. The Invocation And Benediction.

The University's tradition of an invocation and benediction to open and close the Commencement Ceremony has been established since at least 1840—a tradition spanning one hundred and fifty-five years of University history. A religious leader from the Bloomington community is invited to give the invocation and benediction. The person is selected from those actively involved in the university community and familiar with the diversity of the campus. A different person is chosen each year so that invitations rotate in the local community. The person is invited to give an invocation and benediction which are uplifting and unifying to fit the occasion.

In 1995, the Reverend Robert Sims of the St. Paul Catholic Center delivered the invocation and benediction at the Commencement Ceremony. St. Paul is a parish in Bloomington which serves university students. In 1994, the invocation and benediction were given by Reverend Barbara Carlson of the Unitarian Universalist Church in Bloomington.[3] Over the previous five years, the invocation and benediction were delivered by Rev. Cynthia Cochran Carney, First Presbyterian Church; Rev. Philip

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[3] The text of Reverend Sims' benediction at the 1995 Commencement Ceremony is quoted in the Petition at 5. The text of Reverend Carlson's 1994 benediction was:

> Before we rush out of this place, floating, climbing, dancing, we pause again in reverence before the holy.
>
> Aware that this ceremony has been a door that opens, yet closes, too; a passage in time.
>
> Take what you have learned.
>
> And add to it; the truest knowledge grows.
>
> Give thanks and turn yourself with courage toward the future.
>
> Go and live.
>
> And may life's deepest meanings attend you. Amen.

Amerson, First United Methodist Church; Rev. Ross Marrs, First United Methodist Church; and Rabbi Susan Shifron, B' Nai B'Rith Hillel Foundation.[4]

The University's purpose and intent in continuing the 155-year tradition on its Bloomington campus is not to sponsor or establish any particular religious faith or to endorse religion in general. Rather, the University believes that inclusion of a nonsectarian invocation and benediction to open and close the Commencement Ceremony serves significant secular objectives. The invocation and benediction serve to emphasize the solemnity and dignity of the larger ceremony of which they are a small part. In addition, inclusion of the invocation and benediction continues a tradition on a campus that cherishes both the physical structures and the traditions that it has inherited from the preceding century. By participating in the tradition, students and others are given a sense of belonging to something that transcends the present moment.

C. The Petitioners.

Petitioner Tanford is a full professor with tenure at the University. He has taught at the School of Law since 1979 and is currently the John Hastings Faculty Fellow.

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[4] The Petition states (at 3) that "[n]o one from outside the Judeo-Christian tradition has ever been invited" to give the invocation and benediction. There is no such evidence of record. The record does show that when a "mosque" was built in Bloomington, the University inquired whether anyone there was interested in participating. The Petition's statements (at 6) as to the "only" persons invited "[u]ntil a few years ago" and changes "within the last ten years" are not only unsupported but also affirmatively contradicted by the record. The Petition's statement (at 3) that "instructions" are given is petitioners' characterization of the University's request that the invocation and benediction be uplifting and unifying.

The Petition erroneously states (at 2) that Professor Tanford's "attendance at graduation is not voluntary," and wrongly claims (at 7) that the Seventh Circuit erroneously stated the facts because Tanford is "not free to skip the morning ceremony . . . ." The uncontroverted evidence established that law school faculty members are asked by an Assistant Dean to volunteer to attend the Commencement Ceremony and "hood" students. One member of the law school faculty has never volunteered. Attending the Ceremony and "hooding" students is not required and is not considered to be part of a professor's service to the University.

At his deposition, Tanford acknowledged that what he described as an "obligation" is not backed by discipline if he chooses not to attend the Commencement Ceremony. He also acknowledged that the Assistant Dean has no real power over his career. Moreover, when Tanford declined to attend on a previous occasion, as a matter principle because of the invocation and benediction, the Assistant Dean respected that decision. Tanford did not even bother to ask anyone else, such as the Dean of the law school or the President of the University, whether a decision to decline as a matter of conscience would have any effect on his career. Tanford testified that he does not believe "that anyone in the university would retaliate against me for a single incident . . . There is a tremendous amount of tolerance for eccentric people in the university."[5]

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[5] The Petition also states (at 8) that Professor Tanford's "attendance was not voluntary, but was 'part of [his] duties at the law school,'" quoting 883 F. Supp. at 1235. The Petition, however, is quoting the district court's preliminary injunction decision, not its final decision. Moreover, even that quotation from the preliminary injunction decision omits the district court's notation that "no explicit requirement is imposed on faculty to attend the commencement ceremony and no sanction flows from a failure to volunteer for such service." Pet. App. a-32 n.2.

The Petition states (at 2) that Tanford objects "to nondenominational public prayer on religious grounds, believing them to trivialize and desanctify communication with his god." At his deposition, Tanford said he was not sure he could articulate the precise reasons why he was offended by the invocation and benediction. He further testified that (1) "the religious side of me finds this kind of watered down nonsectarian civic religion Judeo-Christian tradition prayer offensive"; (2) "on the other hand I think it is too religious"; and (3) in a "somewhat trivial sense" it is catering to the "religious right." Tanford said he believed that everyone participated in the invocation and benediction simply by being there, but admitted that "I don't think that because 7,000 people stood, I don't believe for a minute that all 7,000 people believed in the religious message," and that "I am certain there are a lot of people who did not intend by remaining to express agreement with the message." On the question of whether the invocation and benediction would affect people's religious beliefs, he responded in part: "Taken in isolation, obviously not. I cannot imagine that a single one minute watered down prayer is going to change anyone's mind on religion." He thinks, however, that some people are "affected by the cumulative experience of little things like this."

Tanford testified that in 1987, the one occasion in 15 years before his lawsuit when he did attend the Commencement Ceremony, he went because he was asked to "hood" students. During that 1987 Ceremony, Tanford absented himself when the invocation began, returned for the "hooding," and left again before the benediction. He said he left before the benediction in 1987 in part "hoping that people would ask me later why I had done it and that I then could . . . engage them in a dialogue to explain my reasons." After attending the Commencement Ceremony in 1987, Tanford

wrote a letter to the editor of the student newspaper "urging the university community generally, the faculty particularly, to boycott graduation on the grounds of the inappropriateness of having prayer."

Petitioner Urbanski is an undergraduate student who entered the University after the district court's preliminary injunction decision and was later added as a plaintiff. He testified that he joined the lawsuit after reading a pamphlet "looking for people to get involved with a lawsuit against the university" and contacting Tanford.

Urbanski is a computer science major, with a possible double major in cognitive science. He testified that, as a college student, he is much more independent than in high school and is being challenged by ideas more than in high school. The college experience is attractive to him because of the critical thinking and the diversity of beliefs on a college campus. He said "it's refreshing to see, you know, different people, different countries, different belief systems, even sexual orientations . . . ."

Urbanski testified that he opposes prayer because he believes there should be a separation between church and state in a public institution. He considers it a political issue and also a personal issue because prayer makes him uncomfortable. He wants the school in a way to reflect his beliefs which are atheistic. However, he agrees with the policy of his public high school, which allows students during their commencement speeches to have a moment of silence or a short prayer if they choose.

Urbanski said he would go to his Commencement Ceremony in 1999 and elect to stay during an invocation and benediction, because it is an inconvenience to leave during parts of the ceremony. He would do what he usually does when he is in a group of people and there is a prayer: "I would just sit there quietly until it was over." He

testified he would not participate in the prayer and knows there would be other people in the stadium who would be doing the same thing—sitting quietly and not participating. He said he could listen without any impact on his beliefs.[6]

D. Available Accommodation.

One of the responsibilities of Thomas Bolyard, the Director of Field Services at the Indiana University Alumni Association in Bloomington, is to accommodate persons who have special problems or requests related to the Commencement Ceremony on the Bloomington campus. Bolyard stated that it would be a relatively easy matter to accommodate Professor Tanford and others who wish to be seated in a way that they may inconspicuously enter and exit the Commencement Ceremony. He further stated that some students and faculty always arrive late and leave early; that it is common for students and faculty to "get up and 'mill around' for various reasons" during the ceremony; and that students and faculty frequently leave their seats to get a drink or to use the restrooms.

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit Considered And Correctly Applied *Lemon*.

The Petition argues (at 9-13) that the Seventh Circuit "ignored" and "fail[ed] to apply" the test of *Lemon v. Kurtzman*, 403

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[6] The Petition states (at 7) that the Seventh Circuit erred as to Urbanski in stating that "plaintiffs could simply attend the afternoon ceremonies," because "Urbanski is an undergraduate, and the afternoon ceremony was for law students only." There is, however, no evidence that Urbanski will be unable to attend a ceremony or activity held by his own school for its graduating students (or that such ceremony or activity would include an invocation or benediction).

U.S. 602 (1971). This is untenable on the face of the Seventh Circuit's opinion. The court repeatedly referenced *Lemon*. Pet. App. a-6, a-7, a-9. The court expressly ruled that "the invocation and benediction serve legitimate secular purposes" (the first part of the *Lemon* test). *Id.* at a-9. The court expressly stated that it agreed with the district court's analysis of the "effect" and "entanglement" parts of the *Lemon* test. *Id.* at a-10; *see id.* at a-24 to a-28.

It is equally clear that the decision below is correct on these issues. The first, "secular purpose," part of the *Lemon* test focuses on the government's intent or motive for the challenged action. *"Lemon*'s 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting *with the intent* of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) (emphasis added). However, the government's purpose need not be "'exclusively secular.'" *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984). Rather, a challenged action is invalid on this ground only if the government was "motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. *Accord, e.g., Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). Stated differently, *Lemon's* purpose test "does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement 'that the government show a callous indifference to religious groups,' . . . and the Establishment Clause has never been so interpreted." *Amos*, 483 U.S. at 335 (citation omitted).

The uncontroverted evidence established that Indiana University's purpose is *not* to sponsor any particular religion, or to endorse religion in general. Rather, its purposes for the invocation

and benediction are to solemnize the Commencement Ceremony and continue the University's 155-year tradition. These are legitimate secular purposes.

> [S]uch governmental "acknowledgements" of religion as legislative prayers . . ., government declaration of Thanksgiving as a public holiday, printing "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court" . . . serve . . . the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.

Lynch, 465 U.S. at 692-93 (O'Conner, J., concurring). In the context of a university's graduation ceremony, a brief and nonsectarian invocation and benediction are merely another type of such "ceremonial deism," which does not violate the Establishment Clause. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 602-03 (1989); *id.* at 596 n.46 (plurality opinion); *id.* at 630 (O'Conner, J., concurring in part and in judgment); *Engle v. Vitale*, 370 U.S. 421, 435 n.21 (1962). Other examples include Presidential Proclamations calling for prayer, *Lynch*, 465 U.S. at 675-76 & nn.2-3; prayer at Presidential inaugurations, *County of Allegheny*, 492 U.S. at 671-72 n.9 (Kennedy, J., concurring in judgment in part and dissenting in part); and federal statutes providing for a "National Day of Prayer," *Lynch*, 465 U.S. at 677, for the words "under God" in the Pledge of Allegiance, *Wallace*, 472 U.S. at 78 n.5 (O'Conner, J., concurring in judgment), and for the words "In God is our Trust" in the National Anthem, *Engle*, 370 U.S. at 449 (Stewart, J., dissenting).

The second *Lemon* factor—whether the primary effect of the challenged action is to advance or inhibit religion—is to be applied in a practical and realistic manner. The issue is not whether there is any remote or incidental "advancement." As this Court has said, its "precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch*, 465 U.S. at 683. *See also, e.g., Bowen*, 487 U.S. at 607.

In *Lynch*, the Court held that a city's inclusion of a nativity scene in its Christmas display did not impermissibly "advance" religion under the *Lemon* test:

> [T]o conclude that the primary effect of including the creche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, . . . expenditure of public funds for transportation of students to church-sponsored schools, . . . federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, . . . noncategorical grants to church-sponsored colleges and universities, . . . and . . . tax exemptions for church properties . . . . It would also require that we view it as more of an endorsement of religion than . . . Sunday Closing Laws[,] . . . [a] release time program for religious training[,] . . . and . . . legislative prayers . . . .
>
> We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause.

465 U.S. at 681-82 (citations and footnotes omitted).

The same is true of the invocation and benediction here. It is not reasonable to contend that these few moments during a once-a-year event, at a major university devoted to scholarship, criticism and free-ranging pursuit of all sorts of ideas, have a greater effect in "advancing" religion than the types of governmental actions surveyed in the above-quoted passage. As in *Lynch*, "whatever benefit" the invocation and benediction may be to one faith or to all religions is at most "indirect, remote, and incidental." *Id.* at 683.

The third *Lemon* factor, whether the challenged action creates "excessive entanglement" between church and state, is not a serious issue. The University's role is limited to inviting a member of the clergy on a rotating basis—from among those who are familiar with the University and its diverse community—and expressing the desire that the message be uplifting and unifying. As in *Lynch*, "[t]here is nothing here . . . like the 'comprehensive, discriminating, and continuing state surveillance' or the 'enduring entanglement' present in *Lemon* . . . ." 465 U.S. at 684. *See also, e.g., Mueller v. Allen*, 463 U.S. 388, 403 (1983) (government monitoring of books and instructional materials for religious content to determine eligibility for tax deduction does not constitute excessive entanglement); *Bowen*, 487 U.S. at 616-17 (similar—grant monitoring); *Agostini v. Felton*, ___ U.S. ___, 1997 WL 338583 at *19-20 (1997) ("administrative cooperation" between public officials and parochial schools, and "monthly visits of public supervisors," does not create excessive entanglement).

II. The Seventh Circuit Properly Considered *Marsh* And *Lee*.

The Petition argues (at 13-16, 25-27) that the Seventh Circuit erred in "app[lying]" *Marsh v. Chambers*, 463 U.S. 783 (1983), and

that its decision "is not consistent" with *Lee v. Weisman*, 505 U.S. 577 (1992). These arguments misconstrue both the Seventh Circuit's decision and those Supreme Court precedents.

As an initial matter, the Seventh Circuit properly considered both *Lee* and *Marsh* in resolving this case. In their Brief of Appellants (at 12), the petitioners explicitly represented to the Seventh Circuit that "it would not be improper to view the decision in this case as turning on . . . whether [the facts here are] more like the graduation prayer in *Lee* or the legislative prayer in *Marsh*." Moreover, the court necessarily had to consider whether there was "coercion" under the standards of *Lee*.

Petitioners repeatedly misconstrue the decision in *Lee*. For example, they say (Pet. at 19) that *Lee's* discussion of the role of the school principal in "direct[ing] and controll[ing] the content of the prayers" shows there is "excessive entanglement" here. *Lee*, however, was not addressing "entanglement" and, indeed, did not apply the *Lemon* test at all. 505 U.S. at 586-87. Rather, the majority in *Lee* concluded that the role of the school officials contributed to the *coercive* effect of graduation prayers in the secondary school context, as those officials' "effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject." *Id.* at 590.

More generally, in finding that the graduation prayer in *Lee* violated the Establishment Clause, Justice Kennedy's opinion for the Court focused squarely on coercion, and rested on a detailed analysis of the secondary school setting, the immaturity of adolescents, and the peer, public and school official pressures to which young persons of that age and in that context are subjected. *Id.* at 592-98. In addition to the role of the school official in the prayer, those officials' "supervision and control" of the graduation ceremony itself "place[d]

public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain a respectful silence . . . . This pressure, though subtle and indirect, can be as real as any overt compulsion." *Id.* at 593. Hence, the Court concluded, a "reasonable" high school student "in this milieu could believe that the group exercise *signified her own participation or approval of it.*" *Id.* (emphasis added). Given her reasonable belief in this context that she was signifying participation or approval, the student was put "in the dilemma of participating . . . or protesting." *Id.* The Court reasoned that "primary and secondary school children" could not constitutionally be placed "in this position," emphasizing the force of peer pressure among "adolescents" which made protest an unrealistic alternative. *Id.* at 593-94. Finally, although attendance at graduation was not required in *Lee*, the student did not have "a real choice" to avoid the dilemma because "in our society and in our culture high school graduation is one of life's most significant occasions," and thus "a student is not free to absent herself from the graduation exercise in any real sense of the word 'voluntary' . . . ." *Id.* at 595.

As the district court held (Pet. App. a-18 to a-24) and the Seventh Circuit affirmed (*id.* at a-7 to a-9), none of the factors creating impermissible coercion in *Lee*, let alone all of them, are present in the university context here. The plaintiffs' own testimony established that they did not believe that standing or remaining silent "signified . . . participation or approval" of the prayer. Nor could they "reasonably" believe the contrary. The Commencement Ceremony is in a stadium with tens of thousands of people who are members of a truly international university community, drawn from all manner of backgrounds, ethnic groups, religions and non-religions. No reasonably objective person could draw any conclusion about the participation or approval of someone who simply stands and remains

silent during an invocation and benediction that open and close the ceremony.

Similarly, the plaintiffs' own testimony established that they are not like the adolescent student in *Lee*, for whom social convention and peer pressure made "protest" an unacceptable alternative. Nor would a contrary conclusion be reasonable. Moreover, a person who chooses to remain seated during the invocation and benediction would scarcely be noticed, let alone cause a stir, in a football stadium filled with thousands of people. Alternatively, a "protestor" can be accommodated if he or she wishes to avoid these parts of the ceremony altogether.[7]

The Petition (at 22-24) also errs in claiming that the Seventh Circuit's "*de minimus*" statement contravenes *Lee*. The Seventh Circuit's statement was addressing the "effect" part of the *Lemon* test. *See* Pet. App. a-10. As noted above, this Court has repeatedly held under that test that "indirect, remote, and incidental" advancement effects do not violate the Establishment Clause. *Lee*, by contrast, was not applying the *Lemon* test but rather a coercion analysis. And even in that context, the Court emphasized that the issue "is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State." 505 U.S. at 598. *Lee* also reiterated that:

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[7] There are, of course, many other differences as well. For example, the University-wide graduation ceremony does not have the same social importance creating compulsion to attend, and approximately one-third of all graduates choose not to do so.

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is true of course that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Id., *quoting School Dist. of Abington v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring).

Petitioners also err in repeatedly proclaiming "circuit conflicts" based on decisions involving prayer in primary and secondary schools. Pet. at 12-13, 15-16, 18, 21-22, 24, 26-27. As both courts below held, this case, which involves a *university* ceremony, is fundamentally different.

The Supreme Court's precedents repeatedly recognize as much. In *Lee*, for example, the Court explicitly stated that its "controlling precedents" were those involving "prayer and religious exercise in primary and secondary public schools . . . ." 505 U.S. at 586. *See also, e.g., id.* at 592 (citing precedents observing "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"). At the same time, this Court's religion cases have repeatedly recognized the substantial difference, in impressionability and maturity, between primary and secondary students on the one hand and university students on the other. Pet. App. a-9, *quoting Widmar v. Vicent*, 454 U.S. 263, 274 n.14 (1981); Pet. App. a-20 to a-21, *quoting Tilton v. Richardson*, 403 U.S. 672, 686 (1971); *see*

also, e.g., Edwards v. Aguillard, 482 U.S. 578, 584 n.5 (1987); *id.* at 607 n.7 (Powell, J., concurring); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 765 (plurality opinion) (1976).[8]

Petitioners also err with respect to *Marsh v. Chambers* (Pet. at 13-15). Initially, they are plainly wrong in contending that the Seventh Circuit "appl[ied] the 'tradition' exception" of *Marsh* to the exclusion of *Lemon*. The court mentioned *Marsh* in a single sentence in the course of addressing the "secular purpose" part of the *Lemon* test. Pet. App. a-9. Moreover, the relevance of *Marsh* is not so limited as petitioners contend.

Lee extensively addressed and distinguished the legislative prayers in *Marsh* precisely on the ground of the coercive effect of prayer in the secondary school context, "in which the student was left with no alternative but to submit." 505 U.S. at 596-97. The differences "between the facts of *Marsh*" and those in *Lee* were dispositive, and the Court explicitly concluded that "[o]ur decisions in *Engle v. Vitale* . . . and *School Dist. of Abbington v. Schempp* . . . require us to distinguish the public school context [from the legislative prayers in *Marsh*]. *Id.* at 597. Moreover, other opinions have pointed to the legislative prayers in *Marsh* as one example of non-coercive ceremonial "acknowledgments" of religion which do

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[8] *Cf. Wallace*, 472 U.S. at 81 (O'Conner, J., concurring in judgment):

> At the very least, Presidential Proclamations [calling for public prayers] are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs. *See, e.g., Marsh v. Chambers* . . . [and] *Tilton v. Richardson* . . . .

not violate the Establishment Clause. *E.g., County of Allegheny*, 492 U.S. at 596 n.46 (plurality opinion); *id.* at 630-31 (O'Conner, J., concurring in part and in judgment); *id.* at 662-63 (Kennedy, J., concurring in judgment in part and dissenting in part).

Finally, although petitioners would confine the legislative prayers upheld in *Marsh* to a "unique exception" based on history (Pet. at 14-15), the opinion in *Marsh* explained that the significance of "history" was the light it shed on the "*intent*" of the Framers of the First Amendment. 463 U.S. at 790 (emphasis added).

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Id. The Court added that "[i]n applying the First Amendment to the states through the Fourteenth Amendment, . . . it would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Id.* at 790-91.

Under a coherent view of "original intent" as a mode of constitutional interpretation, it cannot be thought that the same draftsmen—who viewed prayer by government-paid clergy to begin every session day of our national legislature as consistent with the Establishment Clause—would have viewed differently a brief invocation and benediction, by unpaid clergy invited on a rotating basis, during a once-a-year mass ceremony at a State university. To the contrary, those Framers of the Establishment Clause "did not consider opening prayers as a proselytizing activity or as

symbolically placing the government's 'official seal of approval on one religious view' . . . ." *Id.* at 792 (citations omitted). Moreover, under any realistic view of the matter, the invocation and benediction here are far less problematic under the Establishment Clause than daily prayers at the heart of government in our Nation's capital.[9]

III. Petitioners' Other Contentions Are Also Wrong.

Petitioners' assertions that prayer may never be used to solemnize public occasions (Pet. at 20-22) cannot be reconciled with this Court's opinions. *See* Part I, *supra*. Petitioners' authority, *Lee*, held to the contrary only in the secondary school setting and because of the coercive effects of prayer there. By contrast, and as in the cases of legislative, presidential and other prayers, no such coercion is presented here. Indeed, the familiar "God save the United States and this Honorable Court" is an invocation and a prayer. *Engel*, 370 U.S. at 439 (Douglas, J., concurring); *Lee*, 505 U.S. at 635 (Scalia, J., dissenting). The meaningful differences between that judicial invocation and Indiana University's invocation and benediction cut the other way. The judicial invocation occurs every session day of court (rather than once a year) and in a courtroom with litigants

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[9] *Cf. County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part) (footnote omitted):

> *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.

present (rather than in a stadium filled with tens of thousands of people).[10]

Petitioners also err in criticizing the Seventh Circuit's consideration of the fact that the invocation and benediction are "nonsectarian" (Pet. at 16-18). While that fact alone is not dispositive of the issue—and the Seventh Circuit did not purport to say otherwise—the nonsectarian nature of a prayer, display or other reference to a deity is clearly *relevant* to whether a challenged expression violates the Establishment Clause. *See, e.g., County of Allegheny*, 492 U.S. at 602-03. Indeed, the sectarian nature of the expression (as well as other factors such as its duration and pervasiveness) were crucial to the "city seal" decisions that petitioners wrongly claim conflict with the decision here. *See, e.g., Robinson v. City of Edmond*, 68 F.3d 1226, 1230-33 (10th Cir. 1995) (following *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992)); *compare, Gaylor v. United States*, 74 F.3d 214, 216-17 (10th Cir.) (federal statutes establishing "In God we trust" as the national motto and providing for its inscription on all coins and currency do not violate the Establishment Clause), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1830 (1996).

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[10] Petitioners' "solemnization" contention also apparently argues (Pet. at 21-22) a sort of "available alternative means" analysis. A majority of the Supreme Court has twice rejected such a test in Establishment Clause cases. *Lynch*, 465 U.S. at 681 n.7; *County of Allegheny*, 492 U.S. at 636-37 (O'Conner, J., concurring in part and in judgment); *id.* at 676 & n.12 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ., concurring in judgment in part and dissenting in part). Indeed, none of the forms of "ceremonial deism" noted above could survive such a test, whereas this Court has "avoided drawing lines which entirely sweep away all government recognition and acknowledgement of the role of religion in the lives of our citizens . . . ." *Id.* at 623 (O'Conner, J., concurring in part and in judgment).

The nonsectarian nature of an expression is also particularly significant under the "endorsement" standard employed by Justice O'Conner, which asks whether the challenged expression communicates the government's disapproval of other religious choices. *County of Allegeny*, 492 U.S. at 631 (O'Conner, J., concurring in part and in judgment). This endorsement standard "focuses upon the perception of a reasonable, informed observer," *Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 2452 (1995) (O'Conner, J., concurring in part and in judgment), who "must be deemed aware of the history and context of the community and forum in which the religious display appears," *id.* at 2455. Here, such a reasonable and informed observer would be aware, *inter alia*, of the brief and nonsectarian nature of the invocation and benediction, of the University's 155-year tradition, and of the wide-ranging scholarship, criticism and advocation of all sorts of ideas in this university "community" and "forum." Such an observer would not perceive the invocation and benediction during its Commencement Ceremony to be disapproval by Indiana University of other religious choices.[11]

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[11] Petitioners' own affiant stated, *inter alia*:

> . . . Indiana University strives to provide a learning and living environment that honors and affirms the broadest diversity of religious opinions among its students, faculty and staff. My experiences with many segments of the University structure lead me to view it as operating from a truly secular or humanistic value base.
>
> * * *
>
> Over 2,200 students from outside the United States are enrolled at I.U. Its faculty reflects the importation of scholars from many nations. Among this international contingent are those who hold to cultural and religious traditions, ethnics and values quite outside the scope of the Euro-American dominant cultural and religious mores found on this campus.

Affidavit of Robert E. Turner ¶¶ III, VI.

CONCLUSION

Under every standard employed by majorities of the Supreme Court, the inquiry in an Establishment Clause case is sensitive and fact-specific. Under the *Lemon* test, "[i]n each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678. Similarly under a coercion approach, the inquiry is "delicate and fact-sensitive" and "of necessity one of line-drawing . . . ." *Lee*, 505 U.S. at 597, 598. Likewise under the endorsement standard, "[e]very government practice must be judged in its unique circumstances," *Lynch*, 465 U.S. at 694 (O'Conner, J., concurring), which "requires courts to draw lines, sometimes quite fine, based on the particular facts of each case," *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 2526 (1995) (O'Conner, J., concurring). None of these standards require "relentless and all-persuasive" efforts "to exclude religion from every aspect of public life . . . ." *Lee*, 505 U.S. at 598. *Accord, Lynch*, 465 U.S. at 673-75; *id.* at 692-93 (O'Conner, J., concurring).

Both courts below simply applied the pertinent and fact-sensitive standards to the facts presented, and both courts arrived at the same conclusion. Under any realistic view, petitioners are not "coerced to participate" in a religious exercise. There is no evidence, and it is not credibly to be believed, that Indiana University's "real" purpose or intent is to promote religion. From a reasonable and objective standpoint, which considers the history and circumstances of the Commencement Ceremony as well as the broader University context in which it occurs, the invocation and benediction are not a disapproval of other religious choices. As a practical matter, any "advancement" of religion from this small part of a once-a-year event is negligible.

The decision below conforms with the decisions of this Court, does not conflict with decisions of any other federal circuit, and does not warrant further review. The Petition should be denied.

Respectfully submitted,

Stanley C. Fickle
Counsel of Record
for Respondents
Robert P. Johnstone
BARNES & THORNBURG
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 638-1313

Dorothy J. Frapwell
University Counsel
Michael A. Klein
Associate University Counsel
Bryan Hall 211
INDIANA UNIVERSITY
Bloomington, Indiana 47405
Telephone: (812) 855-9739